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CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE
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AND IN

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CASES
 DETERMINED BY THE
 CHANCERY DIVISION
 OF THE
 HIGH COURT OF JUSTICE
 AND BY THE
 CHIEF JUDGE IN BANKRUPTCY
 AND BY THE
 COURT OF APPEAL
 ON APPEAL FROM THE CHANCERY DIVISION AND THE
 CHIEF JUDGE
 AND IN
 LUNACY.

CANNOT *v.* MORGAN.

[1875 C. 22a.]

C. A.

1875

Nov. 25

Choice of Court—Transfer of Action—Costs of former unsuccessful Action.

A Plaintiff brought an action for misrepresentation in the Queen's Bench, and discontinued it just before the *Judicature Act* came into operation. An execution for the costs failed to produce anything. The Plaintiff then commenced an action in the Chancery Division for the same purpose against the same Defendants. The Defendants moved to transfer the action to the Queen's Bench Division, on the grounds that it was a case for a jury, and could be better tried in the Queen's Bench Division, and that the action had been brought in the Chancery Division to avoid paying the costs of the former action:—

Held, that a transfer ought not to be ordered, as the case could be tried by a jury in the Chancery Division; and as regarded the costs, the proper course was to apply to the Judge to whose Court the action was attached for a stay of proceedings till they were paid.

THIS was an application by the Defendants, *Morgan & Gooch*, to transfer an action from the Chancery Division to the Queen's Bench Division.

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4 C. D. 761
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The writ was issued on the 11th of November, 1875, and by the indorsement the Plaintiff claimed damages for untrue representation by the Defendants to the Plaintiff that £40,000 was deposited with them, and equitably assigned to the Plaintiff, to secure payment to the Plaintiff of certain sums of money for cartridges which he had agreed to supply to the Provisional Government of *France* in 1870, and also to secure the performance of the agreement by the said Government. He also claimed an injunction to restrain the Defendants from issuing execution on a judgment of *nolle prosequi*, for costs due to them by the Plaintiff in an action in the Queen's Bench Division between the Plaintiff and the Defendants, and to restrain the Defendants from issuing execution for costs in a suit of *Larivière v. Morgan* [1871 L. 33].

The proceedings in the above suit of *Larivière v. Morgan*, which were instituted against *Morgan & Gooch* and others to enforce the alleged equitable assignment referred to above, are reported (1). A decree was made in the Plaintiff's favour, after which *Larivière* died, and the suit was revived by the present Plaintiff. After this the House of Lords, on an appeal by *Morgan & Gooch*, dismissed the bill as against them with costs (2).

On the 16th of July, 1875, the present Plaintiff commenced an action in the Queen's Bench against *Morgan & Gooch* for false representations alleged to have been made by them in reference to the matters in question in the Chancery suit. On the 30th of June the Defendants pleaded, and demurred to the declaration. On the 30th of October, 1875, the Plaintiff discontinued his action, and the costs were taxed at £43, which had not been paid, and the Defendants had failed in an attempt to enforce payment by execution. On the 11th of November the Plaintiff issued his writ in the present action in the Chancery Division, which was brought substantially on the same grounds as the former. The Defendants gave notice of motion before the Lord Chancellor to transfer the action to the Queen's Bench Division.

J. Pearson, Q.C., for the motion:—

This application is made under Order LI., rule 1, of the schedule to the *Judicature Act*, 1875. I ask for a transfer on two grounds:

(1) Law Rep. 7 Ch. 550.

(2) Law Rep. 7 H. L. 423.

1. That the action is brought in the Chancery Division merely to elude the rule which prevailed in the Queen's Bench, Common Pleas, and Exchequer, and no doubt will still be treated as in force, that when an action was discontinued a fresh action could not be brought for the same object until the costs of the first were paid. 2. The case is one which ought to be tried before a jury, and that can be done much better in the Queen's Bench Division than in the Chancery Division.

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The Plaintiff did not appear.

LORD CAIRNS, L.C. :—

I do not think that the right of a Plaintiff to choose his Court ought to be fettered in the way proposed. As regards the argument connected with trial by jury, the action can be tried by a jury in the Chancery Division, and the Plaintiff cannot be obliged to change his Court because the Defendants think that a trial by jury will be conducted better in another Division. The substantial reason of the application is to secure payment of the costs of the former action, but the proper mode of seeking that relief would be to apply to the Judge to whose Court the action is attached to stay proceedings until the costs of the former action were paid. The present application must be refused.

262D-747

Solicitor : *G. M. Clements.*

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Nov. 4.

NOTHARD *v.* PROCTOR.

[1875 N. 49.]

Receiver—Concurrent Suits—Suit in Lord Mayor's Court.

A trader in the City of *London* against whom proceedings in bankruptcy were pending died insolvent before adjudication, leaving all his property to his wife and appointing her his executrix.. A creditor immediately filed his bill for a receiver until a personal representative should be constituted. The wife proved the will before a receiver had been appointed, and the creditor thereupon amended his bill, praying administration of the estate and a receiver. On the day on which the amended bill was served a bill for administration was filed by another creditor in the Lord Mayor's Court, a decree taken by consent for administration, and a receiver appointed. The creditor in that suit was a friend of the testator, who had just before the testator's death supported a proposal made by him for a composition with his creditors. Part of the assets was out of the jurisdiction of the Lord Mayor's Court :—

Held (affirming the decision of *Bacon*, V.C.), that although the Court will not generally interfere with the proceedings of another Court which has power to do complete justice, yet, in the peculiar circumstances of the case, it was right to appoint a receiver in the Chancery suit.

THIS was a motion by the Defendant by way of appeal from an order of Vice-Chancellor *Bacon* for the appointment of a receiver of the estate of *Edward Proctor*, deceased.

Edward Proctor, a fruiterer in the City of *London*, being in difficulties, filed his petition on the 9th of August, 1875, for liquidation by arrangement or composition. A general meeting of creditors was held on the 30th of August, and from the statement of his affairs it appeared that his assets amounted to little more than one-third of his debts. He proposed a composition of 4s. in the pound, but no resolution was passed, and on the following day the Plaintiff, who was one of his creditors, filed a petition for adjudication; and on the 1st of September a Mr. *Edwards* was appointed receiver and manager by the Court of Bankruptcy. On the 7th of September *Proctor* died, leaving a will, by which he gave all his property to his wife, *Mary Ann Proctor*, and appointed her sole executrix. On the death of *Proctor* the executrix at once turned the receiver out of possession, and possessed herself of the assets,

but did not proceed to prove the will. The Plaintiff, on the 9th of October, filed his bill on behalf of himself and all the other creditors against the executrix, praying that, until a personal representative was duly constituted, a receiver and manager might be appointed; and that, if the Defendant should be duly constituted personal representative before the hearing, the estate of *Proctor* might be administered by the Court. On the 12th of October the widow proved the will, and on the 15th the Plaintiff amended his bill, asking for the usual decree in a creditor's suit, and for the appointment of a receiver and manager. The amended bill, with notice of motion for a receiver and manager, was served on the same 15th of October. On the same 15th of October a suit was commenced in the Lord Mayor's Court by *B. Blewitt*, another creditor, against *M. A. Proctor*, and on the same day a decree was made therein by consent for administration of *Proctor's* estate, and *H. A. Milford* was appointed receiver. Notice of this decree was received by the solicitors of the Plaintiff in *Nothard v. Proctor* on the 18th. A considerable part of the assets was situate out of the jurisdiction of the Lord Mayor's Court.

It appeared that *Blewitt* was a friend of the testator, and had supported the proposal for a composition; and that the solicitor who acted for him in the proceedings in the Lord Mayor's Court had acted for the testator in the liquidation proceedings. The present solicitors of *Mrs. Proctor* had acted for *Blewitt* in filing a petition for adjudication against *Proctor* on the 31st of August, 1875.

On the 19th of October the motion for a receiver and manager was heard by Vice-Chancellor *Bacon*, who was of opinion that the circumstances shewed collusion between *Blewitt* and *Mrs. Proctor*, and made an order for the appointment of a receiver and manager, and gave the Plaintiff liberty to amend his bill by adding charges of fraud and collusion, and otherwise as he might be advised, without prejudice to the order. From this order the present appeal was brought.

Kay, Q.C., and *Oswald*, for the appeal motion:—

A decree for administration having been made by a competent Court, and a receiver having been appointed, this Court will not

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interfere. If there is anything wrong in the proceedings in the Lord Mayor's Court, they should be removed under 20 & 21 Vict. c. clvii. s. 20, which provides an efficient remedy, instead of wasting the estate with two suits. The Lord Mayor's Court has concurrent jurisdiction with the Court of Chancery: *Brandon's Practice of Lord Mayor's Court* (1). The old cases shew that proceedings in the Lord Mayor's Court ought not to be interfered with otherwise than by being removed by *certiorari*: *Doegood v. Allen* (2); *Sowton v. Cutler* (3); *Rich v. Jaquis* (4). The original bill was demurrable: *Overington v. Ward* (5).

W. Pearson, Q.C., and C. H. Turner, contra :—

The jurisdiction of this Court to appoint its own receiver is not disputed, and as a matter of discretion it ought to interfere in this case, the proceedings in the Lord Mayor's Court being manifestly collusive, and intended to save the widow, who has been in possession of the testator's property, from being called very strictly to account for it.

Kay, in reply.

JAMES, L.J. :—

I am of opinion that, having regard to the facts and circumstances of this case, the order of the Vice-Chancellor was quite right. I agree that it is not desirable for this Court to interfere with another Court which has powers enabling it to do full justice, but the circumstances of this case are so peculiar as to take it out of the range of general rules. There was a gentleman who was in considerable difficulties—in fact in insolvent circumstances—who therefore really had no property of his own, for everything he had belonged to his creditors. Being in that state of circumstances, he makes a will, appointing his wife sole executrix, so that on his death she would at law be entitled to receive the whole of his assets. She would be liable to account for what she so received; but in the meantime, under the authority given to her by her

(1) Page 5.

(3) 2 Rep. in Ch. 57.

(2) Rep. t. Finch, 224.

(4) 1 Ca. in Ch. 31.

(5) 34 Beav. 175.

husband, the deceased insolvent, she would have an opportunity of doing what it is alleged she has done—applying them for her own purposes. Before the death of the husband some proceedings had been taken against him in bankruptcy by the creditor who filed the bill in the present suit. Another creditor who intervened in those proceedings appears to have been a friendly creditor, who was willing to assist the debtor to effect an arrangement with his creditors. Before the bankruptcy proceedings had led to any result the debtor died, and for some time no probate was taken out, but his wife took possession of his property. The creditor who had taken proceedings in bankruptcy filed a bill here as soon after the death as he could. That bill was framed in the only way in which it could be framed, namely, as a bill to obtain a receiver for the interim protection of the property until a legal personal representative was duly constituted; but it contained an additional prayer, which, whether it could be granted without amendment of the bill or not, at all events could not take away the effect of the other parts of the bill—a prayer that when a personal representative was constituted the estate might be administered by the Court. It is not necessary to decide whether, without amendment of the bill, a decree for administration could, after probate had been obtained, be made under this prayer, though it would not be unreasonable to hold that it could. This prayer, however, at all events shewed an intention to apply to this Court for administration when probate had been obtained. Probate was obtained, and the bill was amended with a view to obtain a decree for administration and the appointment of a receiver in the administration suit. To grant such relief would have been of course, if there had been no suit in the Lord Mayor's Court. On the very day on which the amended bill was filed, a bill was filed in the Lord Mayor's Court, and a decree obtained for administration and the appointment of a receiver. It so happened that the creditor who filed this latter bill was the same creditor who had acted in concert—I will not say in collusion—with the insolvent in the bankruptcy proceedings: a creditor who evidently had very friendly feelings towards the debtor, and may be supposed, therefore, to entertain the same feelings towards the widow, and not to be disposed to call her very strictly to account for the assets. The parties must all

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have known that there was a suit which was pending in this Court, and was intended to be prosecuted as a suit for administration as soon as probate was granted. Under these circumstances, the Vice-Chancellor thought that, notwithstanding the decree in the Lord Mayor's Court, this Court ought to appoint its own receiver. He did not proceed on the ground that a large portion of the assets was out of the jurisdiction of the Lord Mayor's Court, though that is a circumstance which we cannot overlook, but on the ground that the Plaintiff in the Lord Mayor's Court was acting in concert with the widow. It is lamentable that there should be two suits going on for the administration of one estate, and that a very small one; but the party moving—the widow—who rightly seeks to prevent the wasting the property by litigation, has the means of preventing, without any difficulty, the continuance of both suits. She can apply, under the Act, to bring hither the suit in the Lord Mayor's Court. If she does not do so, I think that the receiver, when duly constituted, can obtain from the Vice-Chancellor an order authorizing him to use her name in any proceeding before the Lord Mayor. This is an attempt to stop a Chancery suit which was *bonâ fide* intended to administer the estate in the way most beneficial to the parties interested, and such an attempt is not to be encouraged. It is also to be observed that the appointment of a receiver is in the discretion of the Court, and I should be slow to interfere with the discretion of the Vice-Chancellor unless it was clearly shewn to me that it had been erroneously exercised; but in the present case, if the application had been made to me originally, I should have come to the same conclusion as he did.

MELLISH, L.J., concurred.

Solicitors: *S. Chapman; Crook & Smith.*

HODGES v. FINCHAM.

[1875 H. 67.]

Practice—Judgment to be dealt with as the Court shall direct.

C. A.

1875

Nov. 4.

A Defendant in a suit in Chancery gave judgment in an action at law "to be dealt with as the Court shall direct":—

Held, that although liberty to enforce the judgment would not generally be given until the merits of the case were disposed of, the Court was not precluded from allowing execution to issue at an earlier stage of the cause.

THE Defendants, *Fincham* and *Bellyse*, who had been partners, were officers of a benefit society of which the Plaintiffs were the trustees. On the 28th of July, 1874, the Defendants signed a memorandum by which they admitted that there was due to the society from them jointly £1613. On the same day the Defendants signed an agreement to assign to the Plaintiffs, when required, the debts due to their late firm. These debts amounted to £988. They also gave to the Plaintiffs, on the 4th of August, 1874, a joint and several bond for payment of the £1613 with interest.

On the 17th of January, 1875, the Plaintiffs commenced an action against *Fincham* on the bond, and applied to the Defendants to assign the debts. *Bellyse* was willing to execute the assignment, but *Fincham* refused, and the Plaintiffs, on the 10th of March, 1875, filed a bill for specific performance of the agreement to assign the debts, and for a receiver.

By an order made on the 18th of March, 1875, on a motion for a receiver, *Fincham* undertaking, with the concurrence of *Bellyse*, to give judgment in the action "to be dealt with as this Court shall direct," *T. M. Park* was appointed receiver of the debts.

Judgment was accordingly signed in the action for £1500, the amount remaining due on the bond, and the costs of the action.

On the 12th of October, 1875, the Plaintiffs moved before Vice-Chancellor *Bacon*, as vacation Judge, for leave to issue execution. This was supported by an affidavit of the receiver and the solicitor of the Plaintiffs, from which it appeared that the receiver had got in debts to the amount of £122, and that, having regard to the difficulties in getting them in, he believed that, after all that could

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be got in had been realized, there would be a deficiency of at least £1100. It further appeared from the affidavit that on the 2nd of October *Fincham* had advertised his furniture for sale, and that some of it had been removed. The Plaintiffs' solicitor deposed that, so far as he knew, *Fincham* had no other property on which execution could be levied.

Vice-Chancellor *Bacon* having refused the application, it was now renewed before the Court of Appeal.

Cozens-Hardy, for the appeal:—

If all the debts are got in, the Plaintiffs will still be unpaid by some hundreds of pounds; and as *Fincham* is selling his only property, it is necessary for the safety of the Plaintiffs that execution should issue. They are willing to bring the proceeds into Court if the Court thinks it desirable.

[JAMES, L.J.:—Have you any authority for holding that where judgment is given to be dealt with as the Court shall direct, the Court will deal with it before the hearing? The case does not seem the same as where judgment is given subject to a direction that execution shall not issue without leave of the Court.]

I cannot find any authority either way; but I submit that the Court, under an order in this form, must have jurisdiction to deal with the judgment at any period when the justice of the case requires it.

No counsel appeared for the Respondent.

JAMES, L.J.:—

It appears to me that the meaning of the direction in the order, which is quite a common form, is merely that the Plaintiff shall not enforce the judgment without the direction of the Court; and that although in general the Court would not direct a judgment to be enforced while there remained anything to be tried in the cause, there is nothing to preclude the giving such a direction before the hearing. In the circumstances of the present case, as the judgment is likely to prove valueless if not enforced at once, and the debtor does not appear here to give any explanation, I think it right to allow the judgment to be enforced. As the Appellants

do not object to bringing the proceeds into Court, let them be directed to do so, and let them be at liberty to add their costs both below and here to the debt.

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MELLISH, L.J., concurred.

Solicitors: *Field, Roscoe, & Co.*

In re HUTLEY.

C. A.

1875

Nov. 5.

Practice—Transfer of Cause—Pending Suit—Rules of Court, 1875, Order LI.

The Court of Appeal has no jurisdiction to make an order to transfer a suit which was pending in Chancery before the *Judicature Act*, 1873, came into operation, from one Judge to another.

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IN this case an administration summons had been taken out before the *Judicature Act*, 1873, came into operation, in the Court of Vice-Chancellor *Bacon*, and another summons for the administration of the same estate had been taken out in the Court of Vice-Chancellor *Hall*.

Bathurst now applied, by consent of all parties, and with the consent of both the Judges, that the proceedings pending in the Court of Vice-Chancellor *Bacon* might be transferred to the Court of Vice-Chancellor *Hall*. He referred to the *Judicature Act*, 1873, s. 22, and the Rules of Court, 1875, Order LI.

MELLISH, L.J., :—

The Court of Appeal has no jurisdiction to make an order for transfer, even in pending suits; that power has been taken away by the *Judicature Act*, 1873. The 51st Order of the Rules of Court, 1875, provides that orders for the transfer of actions in the Chancery Division shall be made by the Lord Chancellor, and the same practice must be pursued as to suits which were pending when the Act came into operation.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitor: *H. W. Christmas.*

C. A.

1875

Nov. 7.

In re BOYD'S TRUSTS.*Practice—Transfer of Pending Matter—Rules of Court, 1875, Order LI.*

The Court of Appeal has no jurisdiction to make an order for the transfer of a matter commenced by petition under the statutory jurisdiction of the Court of Chancery before the *Judicature Act*, 1873, came into operation, from one Judge to another.

W. W. KARSLAKE applied for an order to transfer all proceedings in this matter, which was a matter under the *Trustee Relief Act* pending before the *Judicature Act* came into operation, from the Court of Vice-Chancellor *Malins* to that of Vice-Chancellor *Hall*. The application was made with the consent of all parties and of both the Judges. He submitted that the application was not governed by the same rule as *In re Hutley* (1), which was a pending administration suit. The 51st order only applied to actions, which were defined by the interpretation clause of the *Judicature Act*, 1873, s. 100, to be "civil proceedings commenced by writ," and did not appear to be applicable to matters commenced by petition under the statutory jurisdiction of the Court of Chancery. He also referred to the note at the head of the orders of Court, which is as follows:—"Where no provision is made by the Act or these Rules, the present procedure and practice remain in force."

MELLISH, L.J. :—

We have no jurisdiction to make the order. All the Chancery jurisdiction, except the Appellate jurisdiction, has been transferred from the Court of Appeal in Chancery to the High Court of Justice, of which we do not form a part. We have, therefore, no original jurisdiction in Chancery, and the application must be made to the Lord Chancellor.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitor: *Richard Smith*.

(1) *Ante*, p. 11.

BARTLAM v. YATES.

[1873 B. 329.]

Practice—Appeal from Decree before the Judicature Act.

C. A.

1875

Nov. 6.

Where no petition of appeal from a decree has been presented before the *Judicature Act* came into operation an Appellant must proceed under the new practice.

IN this case a party wished to appeal from a decree in Chancery made before the *Judicature Acts* came into operation. No petition of appeal had been presented.

W. P. Beale applied for the opinion of the Court whether a direction was requisite under sect. 22 of the *Judicature Act*, 1873, as to the procedure being under the old or the new practice.

THE COURT (*James* and *Mellish*, L.JJ., and *Baggallay*, J.A.) held that the case was not within the provision as to pending business, that in such cases the Appellant must follow the new practice, and that no direction from the Court was necessary.

Solicitors : *J. & F. Needham.*

MACDOUGALL v. GARDINER.

[1874 M. 200.]

Practice—Bill against Directors of Company—Shareholder's Suit on behalf—Authority of Chairman of Meeting—Motion for Adjournment—Mode of taking Votes.

C. A.

1875

Nov. 5, 8, 12.

The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and, on being put, was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the room. One of the shareholders filed a bill on behalf of

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himself and all other shareholders except the directors, against the directors and the company, stating these facts, and alleging that the course taken at the meeting was taken in collusion with the directors, with a view of stifling discussion, and that the directors were intending to carry out certain measures injurious to the company without submitting the terms to a general meeting; and praying for a declaration that the conduct of the chairman was illegal and improper, and for an injunction to restrain the directors from carrying out the proposed arrangements without submitting them to the shareholders for their approval:—

Held, on demurrer (reversing the decision of *Malins*, V.C.), that the bill could not be sustained, inasmuch as it violated the rule laid down in *Mozley v. Alston* (1) and *Foss v. Harbottle* (2), and asked the interference of the Court in the internal management of the company.

Whether, on a motion for the adjournment of a meeting of shareholders, the votes ought to be taken according to the number of shareholders or of the shares they represent, *quære*.

THIS was an appeal from a decision of Vice-Chancellor *Malins* overruling a demurrer to the bill (3).

The bill was filed by *Alexander William MacDougall*, on behalf of himself and all other shareholders in the *Emma Silver Mining Company, Limited*, except the directors, against the directors and the company.

The bill, after stating that the company was incorporated in November, 1871, for the purpose of working a mine in the *United States of America*, called the *Emma Silver Mine*, set out several of the articles of association, amongst which were those numbered 40 and 42, which provided for summoning special general meetings, and 45, which enabled any member to propose and introduce at a general meeting any subject relating to the affairs of the company of which he had given a certain notice, and also the following articles:—

49. The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

50. At any general meeting, unless a poll be demanded by at least five members, a declaration by the chairman that a resolu-

(1) 1 Ph. 790.

(2) 2 Hare, 461.

(3) Law Rep. 20 Eq. 383.

tion has been carried, and an entry to that effect in the book of the proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

51. If a poll be demanded by five or more members, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting, the chairman of the meeting shall be entitled to a second or casting vote.

53. Every member shall have one vote for every share held by him.

57. Votes may be given personally or by proxy.

The bill also, after stating that the Plaintiff became a shareholder in 1874, and was, when the bill was filed, the registered holder of 1750 shares in the company, alleged various fraudulent transactions on the part of the promoters and the company, and that the Plaintiff and other members of the company believed that the present directors were interested in these matters adversely to the company, and therefore desired to have some person elected a director who would endeavour to obtain a full investigation of these matters.

The allegations contained in the bill on this subject are stated at greater length in the previous report.

According to the statements in the bill the Plaintiff and his friends being unsuccessful in their efforts, in September, 1874, signed a requisition calling on the directors to summon an extraordinary general meeting for the purpose of requesting the chairman, Colonel *Gardiner*, to resign his directorship, and to appoint another director in his place. This requisition was signed by shareholders holding more than one-fifth of the capital of the company. And accordingly, on the 6th of October, 1874, the directors issued a notice convening a special general meeting for the 14th of October.

The Plaintiff received proxies authorizing him to vote at the special meeting from shareholders holding 15,000 shares, while the directors did not receive proxies to an extent reaching one-half of the number of shares represented by the Plaintiff.

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Although the Plaintiff and his party had such a majority if all the votes were properly polled, the Defendants filled the room with persons holding one or two shares each, who, on a shew of hands, would give the Defendants the majority of votes.

The Plaintiff prepared several resolutions for the purpose of proposing them at the meeting, the two first of which were as follows:—

1. That in the opinion of this meeting it is not consistent with the best interests of the company that Mr. *Robert May Gardiner* should remain a director of the company, and that he accordingly be requested to resign his office.

2. That the said Mr. *Robert May Gardiner* not being present to meet the shareholders of this company, after the requisition calling this meeting (first lodged on the 8th of September last), and signed by shareholders, he is now removed from the office of director, and that Mr. be appointed a director in his stead.

The meeting took place on the 14th of October, 1874. Colonel *Gardiner* was absent in *America*, and Mr. *Hutton* was in the chair. He addressed the members, and urged an adjournment of the meeting, partly on the ground that a petition to wind up the company had been presented by a shareholder, and that it was expedient to postpone the discussion of the matters before the meeting until after the petition had been disposed of. The Plaintiff proposed the first resolution, and it was discussed by the chairman. Various trivial objections were taken to it, such as that it ought to have embraced the appointment of a new director as well as a request to *Gardiner* to resign. On that ground Mr. *Hutton* refused to put the first resolution to the meeting, although Mr. *Burnand*, the only other director present, openly dissented from that view. In the midst of the discussion which followed, and after the Plaintiff had pointed out that if the resolution were passed he would follow it up by others, copies of which the chairman held in his hand, a member proposed the adjournment of the

meeting for a month. This proposal was seconded, and the chairman then put the resolution to the meeting, and declared it to be carried.

The 25th, 26th, and 27th paragraphs of the bill contained in substance the following allegations:—

25. The friends of the directors voted in favour of the resolution, while the Plaintiff and the shareholders acting with him voted against it; and the chairman declared, on the shew of hands, that the resolution had been carried. Five members of the company then present, including the Plaintiff, demanded a poll; but the chairman refused to grant one, on the alleged ground that a poll could not be taken on the question whether the meeting should be adjourned or not, at once left the chair, declaring the meeting adjourned, and immediately left the room; but the demand for the poll was duly signed and handed in.

26. There was no ground under the articles of the company, or otherwise, for holding that a poll could not be taken upon whether the meeting of the company should be adjourned or not, especially when by the motion for adjournment the question before the meeting was, whether certain important matters should then be discussed and voted, or whether they should be postponed for a long or indefinite time. Mr. *Hutton*, however, had, in order to stifle the discussion, and to prevent the matters being voted upon to consider which the meeting was called, in collusion with the other directors, or some of them, determined to carry a vote of adjournment by shew of hands and then to refuse a poll on that question, so as to prevent the proxies given to the Plaintiff and his supporters from being used in support of the resolutions which he was about to bring forward, and which would undoubtedly have been passed but for the conduct of the Defendants.

27. After the poll had been refused several of the members of the company, including the directors, left the room, but a large number still remained, who voted the Plaintiff into the chair, when the Plaintiff's resolutions were passed, the name of *Charles Henry Dunhill*, M.D., of *York*, a duly qualified shareholder in the company, having been first added to the second resolution, he having been proposed and seconded and duly elected as a director of the said company in the place of Colonel *Gardiner*.

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The 28th paragraph of the bill set out a letter by the Plaintiff giving notice to the directors of the passing of the resolutions after Mr. *Hutton* had left the chair, and the allegations concluded as follows:—

“29. In this state of things the Plaintiff and the other shareholders in the company believe, and it is the fact, that the Defendants, the directors of the said company, are about to conclude some arrangements with the persons against whom the company has claims, such as the original vendors of the said mining property to the company, or the promoters of the said company, and others, for the purpose of settling those claims to the great injury of the company and the shareholders therein, and without first submitting those terms to the shareholders of the said company; and the Plaintiff apprehends, and the fact is, that the proposed compromises will at once be carried through unless the Defendants are restrained from so doing by the order of this Honourable Court. The danger is in fact so imminent, that it is impossible for the Plaintiff and those acting with him to call another meeting for the purpose of removing all the directors of the company from their office, or for any other purpose which might effectually stop the said compromises, in time to prevent their being carried out; and even if such another meeting could be convened in time, the Defendants, by the same proceeding as they adopted at the meeting of the 14th day of October, would be again able to break up and would succeed in breaking up the said meeting by improperly deciding that it was adjourned by a mere shew of hands held up by a few friends or nominees of the said directors who are interested in putting an end to all further investigation into the aforesaid matters.”

The bill prayed for a declaration that the refusal to grant a poll on the question whether the meeting should be adjourned at the meeting of the 14th of October was illegal and improper, and for an injunction to restrain the directors from concluding any arrangements with respect to legal proceedings commenced or to be commenced against the vendors of the property to the company, or with any other persons, until such arrangement, if proposed, should have been submitted to the shareholders in the company, and should have been approved of by them; and for a

declaration that *Gardiner* had ceased to be a director, and might be restrained from acting as such director, or that a meeting of the shareholders should be summoned for the purpose of submitting the Plaintiff's resolutions to them.

At the time the bill was filed a petition to wind up the company was pending, and until it was heard, which was not till April, all proceedings in the suit were stayed. The petition having been dismissed, Colonel *Gardiner* demurred.

The Vice-Chancellor overruled the demurrer, and from this decision the demurring Defendant appealed.

Higgins, Q.C., and Wintle, for the Appellant:—

The bill is demurrable on two grounds. In the first place, the bill ought to have been in the name of the company. This rule has been established by *Mozley v. Alston* (1), *Foss v. Harbottle* (2), and was followed in *Gray v. Lewis* (3). If such a bill is filed, and the majority of shareholders disapprove of it, they may bring the litigation to an end by passing a resolution to that effect, and the Court will then order the bill to be taken off the file: *Exeter and Crediton Railway Company v. Buller* (4). The only exceptions to this rule are stated by Mr. Justice *Lindley* in his work on the Law of Partnership (5). One exception is where some fraud has been committed by the directors in the name of the company, or where the company is attempting to do something *ultra vires*: *Clinch v. Financial Corporation* (6). The other exception is where the course attempted to be pursued by the company is injurious to one particular class only of the shareholders, as in *Atwood v. Merryweather* (7). And even in that case, if the matter complained of by the minority is within the legitimate power of the majority the Court will not interfere. For the Court will not interfere with the internal management of the company: *Bailey v. Birkenhead, Lancashire, and Cheshire Junction Railway Company* (8). The present bill comes within neither of these exceptions.

In the second place, there is nothing in the allegations in the bill to shew a title to relief. The only thing complained of is the

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(1) 1 Ph. 790.

(2) 2 Hare, 461.

(3) Law Rep. 8 Ch. 1035.

(4) 5 Railw. Ca. 211.

(5) 3rd Ed. p. 935.

(6) Law Rep. 5 Eq. 450.

(7) Ibid. 464, n.

(8) 12 Beav. 433.

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ruling of the chairman as to the adjournment of the meeting. If the Court will go into that question, we contend that the ruling was quite right. The adjournment is to be made "with the consent of the meeting," and that must mean with the consent of those present at the meeting: *Reg. v. Vestry of St. Pancras* (1); *Reg. v. Hedger* (2). A poll means a reference of the question to the whole of the constituency, which would be absurd in such a case, for the meeting would have to be adjourned for the purpose of taking it: *Reg. v. Cooper* (3). It is also clear that where the votes are taken at a meeting, the votes are to be counted by number of shareholders and not by number of shares; for the 51st clause of the articles says that in case of equality the chairman is to have a "second, or casting vote," which would not apply to the case of the chairman having a number of votes according to his shares. Again, according to the Plaintiff's own shewing it was impossible for him to have carried his resolutions at that meeting, for he only gave notice of a resolution requesting Colonel *Gardiner* to resign, not of a resolution removing him from his office; and as Colonel *Gardiner* was not present, nothing could be done.

[MELLISH, L.J.:—In a late case in bankruptcy, *Ex parte Till* (4), a doubt was suggested as to the mode of voting for the adjournment of a meeting of creditors, but it was not necessary to decide the question.]

Glasse, Q.C., and *Robinson*, Q.C., for the Plaintiff:—

We admit the rule laid down by *Mozley v. Alston* (5), but we contend that this bill falls within the exceptions to the rule. In the first place, the Plaintiff complains that he and those who act with him, although really in the majority, are overborne by the collusive conduct of the directors and their friends. The Defendants are, in fact, acting *ultra vires*. It is exactly similar to *Atwool v. Merryweather* (6). If the Plaintiff is in a minority, the bill comes within the other exception illustrated by *Menier v. Hooper's Telegraph Works* (7), where it was held that where the

(1) 11 A. & E. 15.

(2) 12 A. & E. 139, 151.

(3) Law Rep. 5 Q. B. 457.

(4) Law Rep. 10 Ch. 631.

(5) 1 Ph. 790.

(6) Law Rep. 5 Eq. 464, n.

(7) Law Rep. 9 Ch. 350.

majority are acting oppressively to the minority, one shareholder who is injured may file a bill on behalf of himself and others. In this case some of the members have been denied their rights by the directors who control the company, for it is clearly a right of the members to have a poll if they demand it: *Campbell v. Maund* (1). In fact the meeting was adjourned, but we say it was done illegally, and we have, therefore, a right to file a bill in the name of the shareholders, on the ground that it is to be taken for granted that the shareholders do not approve of an illegal act: *Williams v. Salmond* (2). The chairman, as we contend, acted in distinct violation of the 51st article. We do not say that the poll should have been taken of the whole body of shareholders, but a poll should have been taken in the room of those present by themselves and their proxies, reckoning by shares and not by heads.

Therefore, if the Court is against us on the frame of the suit, we ask for leave to amend by making the company a co-Plaintiff instead of a Defendant. Since the commencement of the argument on the appeal the Plaintiff has been elected a director, and the old directors have resigned; and so far he has obtained the object of the suit (3). But it is necessary to obtain the opinion of the Court as to the power of the chairman to adjourn the meeting without a poll.

JAMES, L.J.:—

I am of opinion that this demurrer ought to be allowed. I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley v. Alston* (4) and *Lord v. Copper Miners' Company* (5) and *Foss v. Harbottle* (6) should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there is something *ultra vires* on the part of

(1) 5 A. & E. 865.

(2) 2 K. & J. 463, 469. *2 In 2 S 251*

(3) On the 10th of November, 1875, the ordinary general meeting of the company was held, at which Colonel Gardiner and the rest of the directors

resigned their office, and a new body of directors, including the Plaintiff, were appointed.

(4) 1 Ph. 790.

(5) 2 Ibid. 740.

(6) 2 Hare, 461.

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the company *quâ* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done. If the majority of the company really are in favour of any particular shareholder who has been interfered with improperly, by misconduct of a director, by misconduct of a chairman, by miscarriage of a meeting or of certain shareholders at a particular date—if the company think that any shareholder has anything which ought to be made the subject of complaint, there is never any difficulty whatever arising from the apparent possession of the seal by the directors, or from any such cause, in filing a bill in the name of the company, if the majority of the company desire it to be filed. Any one of the shareholders might have filed his bill in the name of the company, and then if the directors had said, “You are not the company; the majority do not act with you, but with us”—the Court would, as it has done in other cases, have taken the means of ascertaining which party it is, the Plaintiff’s or Defendant’s, which really represents the majority of the company.

Everything in this bill, as far as I can see, if it is wrong is a wrong to the company, because every meeting that is called must be for some purpose or other—it must be for the purpose of doing or undoing something which is supposed to accrue for the benefit of the company. Whether it ought to have been done, or ought not to have been done, depends upon whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the

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thing should be done, or should not be done, or left unnoticed. I cannot conceive that there is any equity on the part of a shareholder, on behalf of himself and the minority, to say, "True it is that the majority have a right to determine everything connected with the management of the company, but then we have a right—and every individual has a right—to have a meeting held in strict form in accordance with the articles." Has a particular individual the right to have it for the purpose of using his power of eloquence to induce the others to listen to him and to take his view? That is an equity which I have never yet heard of in this Court, and I have never known it insisted upon before; that is to say, that this Court is to entertain a bill for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions *vivâ voce* at a meeting of the shareholders. If so, I do not know why we should not go further, and say, not only must the meeting be held, but the shareholders must stay there to listen to him and to be convinced by him. The truth is, that is only part of the machinery and means by which the internal management is carried on. The whole question comes back to a question of internal management; that is to say, whether the meeting ought or ought not to be held in a particular way, whether the directors ought or ought not to have sanctioned certain proceedings which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed. If there is some one managing the affairs of the company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed, the company are the proper persons to complain of that. It seems to me, therefore, that the thing is perfectly plain and obvious, and when the Master of the Rolls had the case before him he immediately pointed it out, and said, "You have the wrong Plaintiff here—the Plaintiff must be the company." From the first opening of this case before us, I have never had any doubt in my own mind that this was a bill which, if it was to be sustained at all, could only be sustained by the company.

But then the Plaintiff says, "Give us leave to amend." It is rather late to ask for leave to amend when the amendments might

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have been obtained from the Master of the Rolls before any costs had been incurred. But the question is, is there anything substantial in this case on which we should give leave to amend on the part of the company? I can see nothing. I do not think we ought to give leave to amend for the purpose merely of getting a declaration as to what the proper mode of dealing with the adjournment was, because that would be simply to give a declaration without any relief. The company cannot file a bill saying, "Tell us the meaning of the Rules, and what is to be done under them." They must find that out for themselves in the best way they can. We do not sit here to express an opinion on something which may lead to no practical result. I am not aware that there could be any practical result following upon a declaration obtained by the company as to the particular mode in which the meeting ought to have been adjourned, or in what particular way the meetings in future should be adjourned. If there is any doubt about it, if they cannot satisfy themselves as to the way of doing it out of doors, they must call a meeting and make it clear what is the mode in which they wish and propose to have it done.

Then, as to the rest of the relief prayed, that the directors were not to do something without the consent of the shareholders. Of course they cannot do so, and the shareholders can always call meetings if they please. Then, as to the part of the prayer which asks that somebody else shall be restrained from acting, that is in truth given up—it is admitted at the Bar that these resolutions could not have been properly put at the meeting.

It seems to me, therefore, that upon the allegations of this bill there really is no relief which the company can ask for and which we could give the company. We happen to know that the party of the Plaintiff is now in full possession of the company, and the company will, no doubt, do what is right according to his view.

The demurrer must be allowed, with the usual consequences, and without leave to amend.

MELLISH, L.J.:—

I am of the same opinion. I think it is a matter of considerable importance rightly to determine this question, whether a suit ought to be brought in the name of the company or in the name

of one of the shareholders on behalf of the others. It is not at all a technical question, but it may make a very serious difference in the management of the affairs of the company. The difference is this:—Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them—some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation.

In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Mozley v. Alston* (1) and *Foss v. Harbottle* (2). In my opinion that is the rule that is to be maintained. Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different

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(1) 1 Ph. 790.

(2) 2 Hare, 461.

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thing, and there the minority are entitled to come before this Court to maintain their rights ; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside, or to institute a suit in Chancery about it, except the company itself.

BAGGALLAY, J.A. :—

The matters complained of by this bill, and in respect of which relief is sought, are two in number—the one the refusal of the chairman at the meeting on the 14th of October to grant a poll, and the other that certain arrangements are in contemplation by the directors which may have a prejudicial effect upon the shareholders generally. As regards the first of these two matters, a declaration is asked that the refusal to grant a poll was illegal, and two alternative forms of relief are prayed consequent upon such declaration—the one that the resolutions which were passed at the meeting held under the presidency of the Plaintiff after the original chairman had retired were valid and binding ; the other that a meeting should be called under the direction of the Court for the purpose of having those resolutions submitted to the meeting so called.

Now, as regards the former of those two alternatives, I think it was very wisely and properly abandoned in the course of the argument, because one of two things is clear—either that the second meeting of the 14th of October was a continuation of the former one, or an original and independent meeting ; if it was a continuation of the former one, the only proper proceedings which could have been taken would have been to have treated the declaration of the former chairman that the meeting was adjourned as a nullity, and to have directed a poll to be taken on the subject of adjournment ; if, on the other hand, it is regarded as an original meeting, it was not summoned in manner provided by the articles, and the resolution passed could not be binding. The other alternative form of relief seems to me to be such as this Court is not in the habit of granting, namely, to direct a meeting to be called in order that at that meeting certain resolutions should be submitted. I am not prepared to say that a case for calling a meeting may not arise,

particularly when the Court desires to have for its own information the views of the shareholders. Meetings have been directed even where the company is not in course of liquidation, but such a course of proceeding is not usual, and certainly I am not aware that any such case has ever occurred when the calling of a meeting is within the power of the shareholders themselves.

Then if you get rid of these two alternative forms of relief, what becomes of the first paragraph of the prayer, which merely asks a declaration that the view taken by the chairman was illegal and improper, and asks a declaration to that effect with no consequential relief? I apprehend that it is not the practice of the Court to make declarations of so utterly useless a character as is there asked.

But that leaves the second paragraph of the prayer to be considered. Now that is based upon an assumed intention on the part of the directors to enter into certain arrangements which may be prejudicial to the shareholders. But what is the real fact? If you turn to the articles you will find that there the fullest possible powers are given to the directors not only to manage the affairs of the company, but to commence, prosecute, continue or discontinue, any litigation that is pending, and it is proposed to ask the Court to make a declaration that those articles are to be overborne by a further rule or declaration of the Court that the directors are not to act without the shareholders' consent, and that a restriction which the shareholders have themselves waived is to be supplemented by the order of the Court. It appears to me, therefore, that not in respect of any one of the several species of relief asked by this bill could relief be given by whomsoever the bill is filed.

I entirely concur in the views expressed by the Lords Justices, that as far as regards the constitution of this suit, even if the allegations formed the subject-matter for a suit in this Court, the proper parties are not Plaintiffs. I entirely concur in the views expressed by them, and in the reasons assigned. I should certainly have been disposed to have assented to the proposition to give leave to amend the bill had I thought that by amendment of the bill a fair case for the intervention of this Court could

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C. A. have been made, but being perfectly satisfied, for the reasons I
 1875 have just mentioned, that the allegations of the bill, apart from
 MACDOUGALL the parties who may happen to be Plaintiffs, are not such as this
 v. Court could act upon, I am of opinion that it would be most idle
 GARDINER. to give leave to amend.

Solicitors: *Bischoff, Bompas, & Bischoff; Valpy & Chaplin.*

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In re MILNES (A PERSON OF UNSOUND MIND).

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Lands Clauses Act, 1845, s. 69—Lunatic.

Nov. 13.

2CLD690

Land belonging to a lunatic having been purchased by a railway company under the powers of its Act, an order was made for payment of the purchase-money to the credit of the lunacy, and for its investment to the joint account of the lunatic and the company, without its being first paid into Court under the *Lands Clauses Consolidation Act, 1845, s. 69.*

The application for such an order must not be made in the Lunacy only, but also in the Chancery Division.

IN this case the committee of the estate of the lunatic had entered into a provisional contract with the *Midland Railway Company* for the sale to them of three pieces of copyhold land to which the lunatic was absolutely entitled, and which were required by the company for the purposes of one of their Acts. The price, £250, had been ascertained by two surveyors pursuant to the *Lands Clauses Act*. On the 11th of June, 1875, the Master in Lunacy made his report approving of the contract. The committee of the estate, and the persons who had liberty to attend the proceedings in the lunacy, now presented a petition in Lunacy praying that the report might be confirmed; that the committee might be at liberty to convey the lands to the company; that the purchase-money might be invested in consols, and be carried to a separate account in the lunacy intituled "The account of the committee and the *Midland Railway Company*," and the dividends paid to the committee; and that the costs of the Petitioners of and incidental to the conveyance and investigation, deduction and verification of title, and of obtaining and prosecuting the reference

for the same, and of the Petition and of the order to be made thereupon, and also the costs of the investment, might be paid by the company.

C. Roupell, for the Petitioners, referred to *In re Taylor* (1), *In re Briscoe* (2), and 16 & 17 Vict. c. 70, ss. 70, 71, 74.

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*W. P. Beale*, for the railway company:—

I submit that unless the provisions of sect. 69 of the *Lands Clauses Act* are complied with, by payment into Court under that section, the company will not get a good title. If this be so, the only part of the relief asked which can be granted ought to have been applied for without serving the company, and they ought not to bear the costs of the application.

[JAMES, L.J.:—Sect. 69 does not appear to make the title conditional on its provisions being complied with; it is only a direction for safe custody of the purchase-money.]

If the Court is against me on the question of title, and can make the order asked, either in Lunacy or in the exercise of the jurisdiction of the Chancery Division of the High Court of Justice, I do not object to the order, as it will save costs to the company.

JAMES, L.J.:—

If this money had been paid into Court under the *Lands Clauses Act*, 1845, s. 69, we could, by an order in the Chancery Division, have directed it to be carried over to the credit of the lunacy, and there appears to be no reason for requiring the intermediate step to be taken. If, therefore, the company declare themselves satisfied with the title, we will make an order for payment of the purchase-money to the credit of the lunacy, and for its investment to the joint account of the lunatic and the railway company. As the committee may be changed, it will be better that the fund should stand to this account than to the account of the committee and the company. The rest of the order will be as prayed. We are of opinion that the company will acquire as good a title as if

(1) 1 Mac. & G. 210.

(2) 2 D. J. & S. 249. *10 Jan 25. 1875*



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there was a payment into Court under sect. 69 of the *Lands Clauses Act*, but the Petition must be amended so as to be intituled in the Chancery Division as well as in Lunacy, and in the matter of the Railway Act as well as in the matter of the lunatic. It will not be drawn up till the company have accepted the title.

MELLISH, L.J., concurred.

Solicitors: *Watkins, Baker, Baylis, & Baker; Beale, Marigold, & Beale.*

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### BERESFORD v. BROWNING.

[1861 B. 303.]

*Partnership—Agreement as to Share of deceased Partner—Joint and Several Liability.*

46 Aff Cas 510  
12 C.L.D. 583.

By an agreement between A., B., C., and D., four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, it was agreed between and by A., B., C., and D., that in case of either of them retiring from the co-partnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said co-partnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:—

*Held* (affirming the decision of the Master of the Rolls), that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability, which remained joint and several.

*Wilmer v. Currey* (1) considered.

THIS was an appeal from a decision of the Master of the Rolls (2).

(1) 2 De G. & Sm. 347.

(2) Law Rep. 20 Eq. 564.

On the 20th of February, 1855, an agreement was entered into between *James Browning, William Browning, Henry Browning, and Francis Browning*, who were carrying on business in partnership as oil merchants, by which it was agreed that they should continue to carry on the business under the firm of *James, William, & Henry Browning & Co.*, and that the profits should be divided between them in the following shares, namely: four-twelfths to *James*, three-twelfths to *William*, three-twelfths to *Henry*, and two-twelfths to *Francis*. And after reciting that all the partners had considerable sums of money employed in the business as floating capital which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business after the retirement or decease of either of them, it was agreed between the partners as follows: "That in case of either of them retiring from the co-partnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner shall not be compellable by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said co-partnership business immediately, but the clear balance as ascertained from the last stock-taking due to such retiring or deceased partner, together with any additional capital (if any), shall be repaid out of the business by the continuing or surviving partners in manner following (that is to say): the sum of £2000 and interest at £5 per cent. per annum on the whole sum which shall be found due shall be paid at the end of one year from such retirement or decease as aforesaid, and the like sum of £2000 shall be paid at the end of each next succeeding year with interest at £5 per cent. as aforesaid on the balance of the capital, until the whole amount shall be fully paid and discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they are at liberty to do. Lastly, it is understood and agreed that upon the death of either of the said partners during this co-partnership, the last stock-taking of the said firm shall be conclusive as to the share or amount of interest of the deceased partner in the said business, and shall be the sum to be paid to his executors, in the proportions and at the times before mentioned, as in the case

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of retirement of any partner, with interest thereon from the date of such stock-taking at the rate of £5 per cent. per annum in lieu of profits from that time, and without any deduction in respect of bad debts (if any) to accrue between the time of such stock-taking and the day of the decease of such partners so dying as aforesaid: provided always, and it is hereby expressly agreed and declared, that in case at the time of the death of either of the said parties to these presents the stock shall not have been taken in the usual manner at the end of the month of June or during the following July, or the same having been taken shall not have been duly made up and signed by the said parties hereto, or a majority of them, on or before the 31st day of December following, or afterwards by all of them, that then, in the event of decease of either of the said partners between the 31st day of December and the 30th day of June following, the stock shall be taken afresh, and the executors or administrators of the deceased partner shall be entitled to his share of the profits of the said business from the then last proper stock-taking, such share to be duly ascertained, and the amount of the share of the deceased partner shall be paid to the executors of the deceased partner at the times and in the proportions before mentioned; but in the event of the decease of either of the said partners between the 30th of June and the 31st day of December in any year, the stock having been previously duly taken at the usual time, but not carried out into the books and signed, the surviving partners shall be allowed thirty days from the day of the deceased partner's death to complete the stock-taking, and the executors of the deceased partner shall be bound thereby, and in default of the surviving partners so completing such stock-taking so taken, but not carried out as aforesaid within the said space of thirty days, then the stock shall be taken entirely *de novo* as from the last proper stock-taking duly entered in the books as before provided for, and the executors of the deceased partner entitled to his share of the profits at his death, and to be paid as before provided for."

*James Browning* died on the 22nd of April, 1861, intestate. These suits were instituted for the purpose of administering his estate and taking the partnership accounts. A decree was made in both suits, and under an inquiry thereby directed it was ascer-

tained that the sum of £64,784 15s. 7d. was due from *William Browning, Henry Browning, and Francis Browning*, in respect of *James Browning's* capital in the said business, and this sum was payable with interest at £5 per cent. by instalments of £2000, payable on the 22nd of April in each year. By the order made on further consideration, it was ordered that *William Browning, Henry Browning, and Francis Browning*, or the survivors of them, should pay the said instalments to the legal personal representative of the intestate within one calendar month after the 22nd of April in each year.

*Henry Browning* died on the 3rd of November, 1871, and *William Browning* on the 9th of March, 1872.

The instalments were regularly paid down to and inclusive of the instalment which became due on the 22nd of April, 1874. On the 3rd of May, 1875, *Francis Browning*, being unable to pay his debts, instituted proceedings in the Bankruptcy Court for liquidation of his affairs by arrangement.

Under these circumstances the present Petition was presented by the legal personal representative of *James Browning*, for the purpose of raising the question whether recourse could be had to the estates of *Henry Browning* and *William Browning* for payment of the instalments due and to become due; and it was arranged that this question should be argued and decided in the present Petition without the institution of any supplemental suit.

The Master of the Rolls was of opinion that the agreement did not alter the nature of the liability of the surviving partners, which was several as well as joint, but only the mode of discharging it, and that the estates of *Henry* and *William Browning* were liable to the payment of the instalments. From this decision the representatives of *Henry* and *William Browning* appealed.

*Waller, Q.C., and Bunting*, for the Appellants:—

We admit that the ordinary liability of a trading firm to an outside creditor is in equity several as well as joint, but this is not the case of an outside creditor. The agreement was made for the purpose of regulating the rights of the parties *inter se*; and these rights must be governed exclusively by that agreement, which only creates a joint liability on the surviving partners. If the

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terms of the agreement are looked at, there is no personal liability to pay; the only agreement is that the share of the deceased shall be "repaid out of the business." The true construction of the agreement is, that surviving or continuing partners for the time being should alone be liable to pay the instalments out of the partnership assets. Partners are perfectly competent to enter into such an agreement, and it will be construed by Courts of Equity, as at law, as raising a joint obligation only: *Lindley* on Partnership (1); *Sumner v. Powell* (2); *Clarke v. Bickers* (3); *Wilmer v. Currey* (4). The last-mentioned case is so similar to this, that the Master of the Rolls, in deciding against us, virtually overruled it.

*Chitty*, Q.C., and *Ingle Joyce*, for the Petitioners; and *Marten*, Q.C., and *Grosvenor Woods*, for parties in the same interest, were not called on.

*Horton Smith*, for *Francis Browning*.

*J. R. Griffith*, for other parties.

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls was quite right. We must look at the substance of the contract in considering the construction of the instrument. The effect of it is, as the Master of the Rolls said, a contract between three partners and the executors of the fourth for the purchase of his share of the assets, they taking the goods in their character of partners. Although the price was to be ascertained in a particular way, the case is plainly within the rule that the liability of partners for property acquired by them as partners is in equity joint and several. That is the usual form of expressing the rule; but it would be more accurate to say that, so far as regards partners, where there is in equity no survivorship of property, there is in equity no survivorship of liability. Now if the executors of the deceased partner had adopted the same mode of ascertaining the value of the share of the deceased partner as that stipulated for in the

(1) 3rd Ed. p. 382.

(2) 2 Mer. 30.

(3) 14 Sim. 639.

(4) 2 De G. & Sm. 347.

agreement—if they had said, We will take the share according to the last stock-taking—beyond all doubt the ordinary rule of equity would have applied. In my opinion it makes no difference that it was arranged between the partners while they were all alive that, in case of the death of any, the executors should act in that way. I am of opinion that that is really the meaning of the arrangement, and that the language of the contract, so far from being inconsistent with that intention, is in favour of it.

It is said in the agreement that the share shall be paid “out of the business” by the surviving partners, which means that it is to be paid by them as partners; that is the only reasonable interpretation of the words; it is not to be paid by the partners equally, but they are to be liable for it as for any other business debt. If the partnership went on, and the debt was properly entered on the books, it would be entered as a debt from the firm to the estate of the deceased partner. I am, therefore, of opinion that the Master of the Rolls came to a right conclusion.

The case of *Sumner v. Powell* (1) has no bearing on this case; and with respect to *Wilmer v. Currey* (2)—which proceeded upon a dissolution of partnership, and a deed which imported a liability which the Vice-Chancellor considered an entirely new liability—whether the Master of the Rolls was right or not in thinking it was wrongly decided, as to which it is not necessary to give an opinion, it was a decision not applicable to a case like the present, in which the assets were handed over to the surviving partners.

MELLISH, L.J. :—

I am of the same opinion. At law and in equity the death of one of several partners puts an end to the partnership, and in some cases the executors of the deceased partner are entitled to his share of the assets; they may have the assets sold, and the share realized at once. By the agreement in the present case it was stipulated, by a clause which, if the deed had been logically arranged, ought to have come first, that upon the death of either of the partners “the last stock-taking of the firm shall be conclusive as to the share or amount of interest of the deceased partner in the said

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(1) 2 Mer. 30.

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business, and shall be the sum to be paid to his executors in the proportions and at the times before mentioned"—that is as the clauses are arranged; more logically, it should have been "after mentioned." Putting this clause first, the agreement then says that if one partner retires or dies the continuing or surviving partners shall repay the share as a debt ascertained from the last stock-taking by instalments. I think the Master of the Rolls was right in saying that this other clause does nothing more than postpone the payment of the debt. It was to be paid by instalments instead of at once. That this was the intention of the parties is, I think, confirmed by the fact that the clause applies to retiring partners in the same way as deceased partners. It says, "In case of either of them retiring from the co-partnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner shall not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said co-partnership business immediately." It is clear that in this clause at least the words "continuing partner" refer to the case of a retiring partner, and "surviving partner" to the case of a partner who dies; and then it goes on: "But the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), shall be repaid out of the business by the continuing or surviving partners in manner following," &c. I think that here the words "continuing" and "surviving" must have the same meaning as before, namely, that continuing applies to the case of a retiring partner, and surviving to the case of a partner who dies. That being so, all the surviving partners were liable at law for this debt. No doubt, if one of these survivors died, his executors could not at law be sued jointly with the then surviving partners. But that is only because the executors of a deceased partner never could be sued at law. But in equity they would be liable. Now, supposing one partner were to die, and then one to retire, he could not by so retiring avoid his liability at law to the executors of the partner who had died. If this be so, I can see no difference in equity between the case of a retiring partner and one dying; and if one partner retiring does

not cease to be liable at law, I think it clear that if one dies his estate cannot escape from liability—in other words, the liability is several as well as joint.

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BAGGALLAY, J.A.:—

It appears to me that the authorities cited by the counsel for the Appellant only establish the proposition that, where a liability arises from the instrument only, the extent of the obligation must be measured by the terms of the instrument only; and *Wilmer v. Currey* (1) is not inconsistent with this view. Whether the Master of the Rolls was right or not in his explanation of the case, it appears to me that it does not vary the principle laid down in the other cases. The Vice-Chancellor there says (2): “The object of the suit is to enforce, not that different liability which would have existed independently of the deed, but the particular liability created by the deed, which would not have existed but for the deed.” That is very different from the present case. In the present case there is no covenant, but a written agreement; although I do not mean to say that a different interpretation ought to be put upon a covenant and an agreement. Apart from the agreement, there was a joint and several liability on the surviving partners to pay to the executors of a deceased partner the value of his share of the assets, they taking all the assets of the partnership, and that obligation was that the value should be paid at once. As I read this agreement, it was only to allow the other partners to extend the payments over several years instead of paying the whole immediately, which might have been highly detrimental to the business. Great reliance was placed by the Appellants on the words “continuing or surviving partners,” which it was contended meant continuing or surviving from time to time when the instalments were payable. I think it is clear that the words refer to the time of retirement or death, so as to mean in the case of retirement the retiring partners, in the case of death the surviving partners.

Then it is said that the words “out of the business” mean that the executors are to look only to the assets of the business. Such

(1) 2 De G. & Sm. 347.

(2) 2 De G. & Sm. 352.



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a contention seems very improbable having regard to the smallness of the amount of each instalment, and still more if we bear in mind that the partnership was determinable at will. I think the clear object and meaning of the agreement is, that in consideration of the executors leaving the whole share of the assets in the business, the value was to be paid by the partners by instalments instead of in one sum. And when we consider the fact that the shares of the partners were unequal, this view of the construction is confirmed. The appeal must be dismissed with costs.

Solicitors for Appellants: *Walker & Battiscombe.*

Solicitors for Respondents: *R. Smith; Austin, De Gea, & Harding.*

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### *In re* SILKSTONE FALL COLLIERY COMPANY.

*Company—Voluntary Winding-up—Extraordinary Resolution—Form of Notice—Companies Act, 1862, s. 129, sub-s. 3.*

In order to render an extraordinary resolution for the voluntary winding-up of a company valid under the *Companies Act, 1862, s. 129, sub-s. 3*, it is necessary that the notice of the meeting should express that it is intended to propose a resolution that the company is unable, by reason of its liabilities, to continue its business.

THIS was an appeal from an order of Vice-Chancellor *Bacon*, ordering that the voluntary winding-up of the *Silkstone Fall Colliery Company, Limited*, should be continued under the supervision of the Court.

The company was established in August, 1871, and registered under the *Companies Act, 1862*.

On the 19th of August, 1875, the directors issued a circular convening an extraordinary meeting of the shareholders, which was in the following terms:—

“Dear Sir,—An extraordinary or special general meeting of the shareholders of the above-named company will be held at the *King’s Arms Hotel, Barnsley*, on Monday, the 30th day of August, 1875, at 12 o’clock in the forenoon precisely, when your attend-

ance is particularly requested. The business to be transacted at the said meeting will be as follows:—

“1. To take into consideration the present position of the company’s affairs, and the desirability of bringing its operations to a close, and to pass a resolution for the voluntary winding-up of the company should it be determined to do so.

“2. To appoint a liquidator or liquidators for the purpose of carrying out such voluntary winding-up.

“I am, &c.,

“*John Dowson*, Secretary.”

In pursuance of this summons a meeting was held on the 30th of August, 1875, at which a resolution was passed unanimously “That this company cannot, by reason of its liabilities, continue its business, and it is desirable to wind up the same;” and by another resolution, which was carried after a division, the chairman, *Mr. J. Wood Baker*, was appointed liquidator.

These resolutions were not confirmed at any subsequent meeting.

*Mr. E. Kimber*, one of the shareholders of the company, being dissatisfied with the choice of the liquidator, presented a petition for the compulsory winding-up of the company.

When the petition came on for hearing it was supported by a large number of the shareholders, but opposed by the company.

The Vice-Chancellor made an order for the continuance of the voluntary winding-up under the supervision of the Court.

The petitioner was satisfied with this order, but *J. Dowson*, and eighty-one other shareholders who had appeared on the hearing of the petition, appealed from it.

*Fischer*, Q.C., and *Grosvenor Woods*, for the Appellants, contended that the resolution for winding up was invalid, as the notice did not shew on the face of it that it was intended to propose a resolution that the company was unable, by reason of its liabilities, to continue its business. It was therefore not an extraordinary meeting under the 129th section of the *Companies Act*, 1862, and the resolution required confirmation: *In re Brid-*

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*In re*  
SILKSTONE  
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COLLIERY Co.  
—

C. A.     *port Old Brewery Company* (1). They pressed for a compulsory winding-up.

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*In re*  
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*Marten*, Q.C., and *E. B. Michell*, for the Petitioner, distinguished the present case from the case cited, inasmuch as the notice contained the words "to take into consideration the present condition of the company's affairs," which were equivalent to a notice of its inability to continue its business. If the Court should think the notice informal, they asked for an opportunity of calling a full meeting.

*Whitehorne*, for one of the largest creditors.

*Little*, Q.C., and *Begg*, for the directors.

JAMES, L.J. :—

I can see no distinction between this case and *In re Bridport Old Brewery Company*, which I think was rightly decided. The resolutions for winding up and appointing a liquidator were therefore invalid. The order to continue the winding-up under supervision must be discharged, and the directors must immediately call a meeting on the question of passing an extraordinary resolution to wind up. The further hearing of the appeal will be adjourned till the result of the meeting is known.

MELLISH, L.J., BAGGALLAY, J.A., and BRETT, J., concurred.

Solicitor for Appellants: *F. W. Snell*.

Solicitors for Respondents: *E. Kimber*; *Behrend*.

(1) Law Rep. 2 Ch. 191.

## MEMORANDUM.

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*Practice of the Court—38 & 39 Vict. c. 77—Costs of Appeal (Order LV.)—Transfers (Order LI.)—Appeal from Interlocutory Order (sect. 12).*

JAMES, L.J.:—

I desire to mention this for the information of the profession. Under the new law (1) costs are in the discretion of the Court; and the opinion of the Judges of the Court of Appeal is that, as a general rule, the successful Appellant will get his costs. The old rule of this Court, that the successful Appellant has to bear his own costs, is no longer to be acted upon unless the particular Court in the particular case shall make an order to the contrary. This rule is, however, not to apply to appeals which are pending at the time when the new system came into operation: such appeals will be dealt with according to the old practice.

His Lordship also stated that the Lord Chancellor would direct the transfer of any action on a written application to his secretary accompanied by the written consent of all parties. Where all parties did not consent, the application must be made to the Lord Chancellor in Court: Order LI., r. 1.

His Lordship further stated that, without at present settling what was an interlocutory order, the Court had determined that all summonses which finally settled the rights of parties, such as summonses under winding-up orders or in administration suits, would be heard by the full Court of Appeal (38 & 39 Vict. c. 77, s. 12). (1)

(1) 38 & 39 Vict. c. 77, Order lv.

(1) *But see Chyres & Chyres 11 CLD 305, 6-7*

*2 P.P. 333  
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10 CLD 34  
11 CLD 702*



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## BUDDING v. MURDOCH.

[1874 B. 170.]

*Practice—Pleading—Amendment at Hearing—Rules of Court, 1875,  
Order XXVII., r. 1.*

Leave given under the Rules of Court, 1875, Order XXVII., rule 1, to amend a bill at the hearing of the suit on motion for decree, so as to raise an entirely new case. (21)

THIS was a suit instituted to enforce a right claimed by the Plaintiff to the flow of water along an artificial watercourse. The bill rested the Plaintiff's title, 1, on a deed; 2, on prescription.

The cause now came on to be heard on motion for decree. It appeared that both parties were under some misapprehension as to the contents of the deed on which the Plaintiff relied. The Court was of opinion that the title set up by the Plaintiff, both under the deed and by prescription, failed. It was then contended that the watercourse had been constructed by the Plaintiff at considerable expense, with the privity of a predecessor in title of the Defendant, who had stood by and acquiesced; and that the Plaintiff was entitled to maintain the suit on this ground.

*Southgate, Q.C., and Chester, for the Plaintiff.*

*Chitty, Q.C., and Nalder, for the Defendant.*

The MASTER OF THE ROLLS said that the case now set up by the Plaintiff was not raised by the bill; and if the suit had come to a hearing before the recent Act, the question whether the Plaintiff should be allowed to amend would have required great consideration, having regard to the decision in *Lord Darnley v. London, Chatham, and Dover Railway Company* (1). Under the circumstances, he thought the new practice ought to be applied, and that the Plaintiff ought to have liberty to amend; and he made an order accordingly, with liberty for the Defendant to put in a further answer, and both parties to go into further evidence. All costs to be reserved till the further hearing. (22)

Solicitors: *Miller & Miller; Hunt & Son.*

(1) 1 D. J. & S. 204: 9 June 1852

(21) *Seemeth mine father in R. S. 12 years 1874*

*In re* BARKER'S TRUSTS.

*Bankruptcy of Trustee—Removal from Trusteeship—Bankruptcy Act, 1869*  
(32 & 33 Vict. c. 71), s. 117.

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Nov. 6.

A bankrupt trustee ought to be removed from his trusteeship whenever the nature of the trust is such that he has to receive or deal with trust funds so that he can misappropriate them.

17CLD 638

THIS was a Petition under the *Trustee Act*, 1850, and the *Bankruptcy Act*, 1869, asking for the removal of the sole trustee of a will (who had also a beneficial interest under it), on the ground that he had been adjudicated bankrupt, and for the appointment of a new trustee in his place, and for a vesting order.

Part of the property subject to the trusts of the will consisted of bonds transferable by delivery with coupons. The trusts were to receive the income and pay it to one of the Petitioners during life.

*Chitty*, Q.C., and *Bush*, in support of the Petition.

*Chapman Barber*, for the trustee, said that it had never been held that bankruptcy alone was a sufficient reason for the removal of a trustee. There was no case of misconduct made out against the present trustee, and if the safe custody of the property was desired, that object would be sufficiently attained by the appointment of an additional trustee.

*Chester*, for other parties.

JESSEL, M.R.:—

In my view it is the duty of the Court to remove a bankrupt trustee who has trust money to receive or deal with, so that he can misappropriate it. There may be exceptions, under special circumstances, to that general rule; and it may also be that where a trustee has no money to receive he ought not to be removed merely because he has become bankrupt; but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate

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trust funds than one who is wealthy; and besides, a man who has not shewn prudence in managing his own affairs is not likely to be successful in managing those of other people.

However, if special circumstances are required for the removal of a bankrupt trustee, I should in the present case find them in the nature of the trust property. Part of the property consists of bonds with coupons, which could very easily be made away with. The trustee must be removed, and I make an order accordingly.

Solicitors: *Tatham, Procter, & Co.; Walter, Moojen, & Co.*

M. R.

*In re* PEOPLE'S GARDEN COMPANY.

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Nov. 13.

*Company—Winding-up—Staying Action—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 85—Judicature Act, 1873, s. 24, sub-s. 5.*

Where a petition for winding up a company has been presented, an application under the *Companies Act*, 1862, s. 85, to stay a pending action against the company, ought to be made to a Divisional Court of the Division before which, or (where a Judge can be selected) to the Judge before whom, the action is pending, and not to the Judge of the Chancery Division to whose Court the winding-up petition is attached.

THIS was a creditor's petition to wind up the *People's Garden Company, Limited*. The petition was not opposed, and the usual winding-up order was made.

*Cozens-Hardy*, for the Petitioner, asked that the costs of the Petitioner might include the costs of an unsuccessful application to the Common Pleas Division of the High Court of Justice to stay an action of *Kingchurch v. People's Garden Company* (1) which was attached to that Division. He stated that the Divisional Court refused the application, being of opinion that it ought to have been made to the Master of the Rolls, to whose Court the winding-up petition was attached; but he submitted that having regard to sect. 24, sub-sect. 5, of the *Judicature Act*, 1873, there was good ground for applying to the Common Pleas

*See Re Morrison Patent Food, 1 C. P. D. 45. B. H. C. W. 1875/1402*  
*when it was decided that the action was properly brought in the Common Pleas*  
*action was properly brought in the Common Pleas*  
*14 Ch D 502*

Division in the first instance. He did not now ask to stay the action, inasmuch as it could not now be proceeded with, except with the leave of the Court: *Companies Act*, 1862, s. 87.

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*In re*  
PEOPLE'S  
GARDEN  
COMPANY.

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JESSEL, M. R. :—

In my opinion you can only apply to stay an action to the Division in which the action is pending; if I can stay an action in the Common Pleas Division, all the old motions for injunction to restrain actions will come back in another form. This, as it appears to me, would amount to a repeal of the first part of the 5th sub-section of sect. 24 of the Act of 1873, which enacts that “No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction.”

The same sub-section goes on to say, “Nothing in this Act contained shall disable either of the said Courts” (that is, the High Court of Justice or the Court of Appeal) “from directing a stay of proceedings in any cause or matter pending before it if it shall think fit”—therefore the High Court may direct a stay of any action pending before it—“and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not passed, to apply to any Court to restrain the prosecution thereof . . . shall be at liberty to apply to the said Courts respectively by motion in a summary way for a stay of proceedings in such cause or matter.” Any person, therefore, is to be at liberty to apply to the High Court for a stay of proceedings. But how is he to apply? The High Court, as such, does not sit; only Judges and Divisional Courts sit; and the application must therefore be made to a Judge or a Divisional Court. It is to be borne in mind that a Divisional Court is quite different from a Division of the High Court. A Divisional Court, as appears from sects. 40 & 41 of the Act of 1873, consists of not more than three Judges, of whom one must belong to the Division to which “the cause or matter out of which the business arises has been assigned.” Thus a Divisional Court of the Queen’s Bench Division may consist of one Queen’s Bench Judge and two Judges attached to other Divisions of the High Court. Then to what Judge or Divisional



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Court are you to apply? Clearly to the Divisional Court of the Division before which the action is pending; or, if the action is pending before a Division in which you can select a Judge, to the Judge to whose Court the action is attached. An action in the Queen's Bench Division is not pending in the Chancery Division; nor is an action attached to the Court of one Judge in the Chancery Division pending before another Judge of the same Division. Nor will this cause any great expense, as people seem to imagine, for you will only have to take out summonses in the Divisions before which actions happen to be pending, and not a summons in each action. Thus the Queen's Bench Division may by one order stay all the actions pending before it.

As, in my opinion, with great deference to the Common Pleas, the reasons for whose decision are not fully before me, you were perfectly right in applying to that Court, I shall allow you your costs.

Solicitors: *Digby & Liddle.*

M. R.  
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Nov. 13.

### *In re* DALGLEISH'S SETTLEMENT.

*Trustee of Leaseholds—Intestacy—Vesting Order—Trustee Act, 1850 (13 & 14 Vict. c. 60), ss. 15, 32, 34.*

Where a sole or surviving trustee of leaseholds has died intestate and has no legal personal representative, and a new trustee has been duly appointed in his place, the Court has no power under sect. 15 of the *Trustee Act, 1850*, to make a vesting order; nor will the Court appoint an additional trustee under sect. 32 for the sake of making a vesting order under sect. 34, because such a vesting order, if made, would be a mere nullity.

UNDER a settlement made in 1845 on the marriage of Mr. and Mrs. *Dalgleish*, leaseholds became vested in a sole trustee, who had died and had no legal personal representative.

Two new trustees had been duly appointed under a power in the settlement; and a Petition was now presented asking that the leaseholds might be vested in them.

*E. Chitty*, for the Petition.

*Salvage application to Ct. of Appl. adm. was made  
and has been refused under the provisions of the  
Act in this case. 4 Ch. D. 143 C.A.*

*4 Ch. D. 484*

The MASTER OF THE ROLLS said that he had no power under the *Trustee Act* to make the order asked for.

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E. Chitty then referred to *In re Driver's Settlement* (1), and asked leave to amend by asking for the appointment of a third trustee, and for an order vesting the leaseholds in them.

The MASTER OF THE ROLLS said that he had had great doubts as to the propriety of making an order in the case cited, and (although it did not appear in the report) he warned the Petitioner's counsel that he must take the order for what it was worth. The difficulty was that the 34th section of the *Trustee Act*, 1850, enacted that the vesting order should have the same effect as if the person or persons (who before such order were the trustee or trustees, if any) had duly executed all proper conveyances and assignments of the lands. Here there was no person in whom the leaseholds were vested; there was therefore no person who could execute a conveyance of the leaseholds, and a vesting order (which could have no greater effect than a conveyance) would be a mere nullity. What the Court was asked to do was really to take upon itself the functions of the Probate Court, and grant limited administration of the intestate's estate without citing his next of kin. His Lordship thought that was not intended by the Legislature, and notwithstanding that an order had been made in the case of *In re Driver's Settlement*, the present application must be refused.

Solicitors: *Harrisons*.

(1) Law Rep. 19 Eq. 352.

*But where surviving trustee left three
sons two of which were dead & third refused
act the Court of appeal made a vesting
order. Re Rathbone 2 Ch D. 483. C.A.*

Criticised. HUTCHINSON v. JAUNCEY. [1950] 1 All E.R. 165.
Disapproved. HUTCHINSON v. JAUNCEY. [1950] 1 K.B. 574

M. R.

In re JOSEPH SUCHE & CO., LIMITED.

1875

Nov. 25.

Company—Judicature Act, 1875, s. 10—Winding-up before Commencement of the Act—Claim by Secured Creditors—Rule in Bankruptcy.

The provisions of sect. 10 of the *Judicature Act, 1875*, which direct that in the winding-up of any company whose assets may prove insufficient for the payment of its debts the same rules shall be observed as may be in force under the law of bankruptcy, are not retrospective, and do not apply to the case of a winding-up commenced before the commencement of the Act.

Accordingly, where a supervision order had been made before the commencement of the Act :—

Held, that secured creditors, although their claim had not been ascertained or admitted, were entitled to prove for the full amount of their debts without deducting the value of their securities.

THIS was an application on behalf of the *National Bank* that the bank might be at liberty to prove as creditors of the company of *Joseph Suche & Co., Limited*, which was in liquidation, for the full amount of their claim, namely, £40,566 13s. 10d., without making any deduction in respect of the value of the securities held by them.

In January, 1875, resolutions were passed at a meeting of the shareholders that the company should be wound up, and on the 30th of January an order was made that the voluntary winding-up be continued under supervision. The assets of the company were insufficient for the payment of its debts. On the 9th of March, 1875, the *National Bank* sent in their claim to prove as creditors for the above-mentioned sum, for which they held as security certain debentures, shares, and a mortgage of a colliery.

The amount of the debt had not been ascertained or admitted by the liquidators at the time the *Judicature Act* came into operation.

In a previous case of the *Phoenix Bessemer Steel Company* the Master of the Rolls had held that secured creditors, whose claims were admitted before the commencement of the *Judicature Acts*, were entitled to prove without deducting the value of their securities.

Whitehorne, for the *National Bank*, submitted that they were

(11 See 11M (1875) 107

WM 761782
12 ch P. 70

entitled to prove for the full amount of their claim, though the case was distinguishable from that of the *Phoenix Bessemer Steel Company*, inasmuch as the claim was not ascertained or admitted before the commencement of the Act.

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*B. B. Rogers*, for the liquidators :—

The 10th section of the Act of 1875 must be taken to be retrospective in the case of companies under liquidation, there being no words excepting from the operation of the Act the case of a winding-up commenced before the Act.

The rule which is to be applied under this section relates to procedure. In other enactments relating to procedure the Courts have held that they apply to cases then pending. Thus, the Act 3 & 4 Will. 4, c. 42, s. 31, which renders executors liable to pay costs when they are Plaintiffs in any action, was held, in *Freeman v. Moyes* (1), to apply to actions commenced before the Act came into operation. The Act 23 & 24 Vict. c. 126, s. 4, which enables a Judge to deprive a Plaintiff of costs “in any action for alleged wrong,” was held, in *Wright v. Hale* (2), to apply to matter of procedure only, and therefore to be retrospective. The *County Courts Act* (30 & 31 Vict. c. 142), s. 10, which provides for giving security for costs in an action of tort, was held, in *Kimbray v. Draper* (3), to be retrospective, and to apply to an action commenced before the passing of the statute. The *Common Law Procedure Act*, 1854, s. 12, was held, in *In re Lord* (4), to authorize the appointment of an umpire in an arbitration commenced before the passing of the Act. The same principle applies here, and the rule in bankruptcy is, according to the true construction of the section, to be followed in estimating the amount for which the claimants are entitled to prove.

JESSEL, M.R. :—

Since this question came last before me I have consulted several of the other Judges. I then abstained from laying down any general rule, and in the present case I could, if I thought fit, confine my decision to the particular circumstances of this par-

(1) 1 A. & E. 338.

(2) 6 H. & N. 227.

(3) Law Rep. 3 Q. B. 160.

(4) 1 K. & J. 90.



*June 25 1893*



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ticular case, because this claim was brought in before the commencement of the *Judicature Act*, and the words at the end of the section, "may come in under the winding-up of such company, and make such claims against the same as they may be respectively entitled to by virtue of this Act," do not in terms apply to a claim made before the commencement of the Act.

But I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any case of a winding-up which had been commenced before the Act came into operation.

I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding-up, being simply a legal proceeding to recover a debt against a company in liquidation.

If we turn to the Act of 1873 we shall find that this is the view of the Legislature. The 25th section recites that "it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in *England* as to the matters next hereinafter mentioned." Then, passing over the repealed sub-sect. 1, the other sub-sections, especially sub-sects. 4, 5, 6, 8, and 9, almost all relate to substantial alterations in the law. Coming to sub-sect. 1, as modified by sect. 10 of the Act of 1875, it is provided that "in the winding-up of any company under the *Companies Acts*, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . as may be in force

for the time under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of any such company, may come in under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

Such language is not applicable to a claim in a winding-up which may happen not to have been admitted before the commencement of the Act. Putting my decision, therefore, purposely on general grounds, I decide that the claim must be admitted, and the full amount allowed without any deduction for the value of the securities.

Solicitors: *W. Tatham & Sons.*

M. R.

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## RAWLINSON v. MILLER.

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 Nov. 11.

Partition Act, 1868—Decree in County Court—Sale before further Consideration, notwithstanding Inquiry as to one of the Parties interested.

By a decree for administration in a County Court a sale of real estate devised to *A.* and six other persons parties to the suit was ordered, and an inquiry was directed before the Registrar of the Court as to *A.*, who had not been heard of for many years. On an affidavit being produced to the Registrar shewing that *A.* had not been heard of for seventeen years, the sale was effected without any certificate as to the result of the inquiry being made. The sale produced more than £500, and the cause was transferred to the Court of Chancery.

On motion by the purchaser to be discharged and to have his costs paid, on the ground that the sale was invalid as having been made before a certificate in answer to the inquiries had been made:—

Held, that *A.* must be presumed to be dead without issue; and that, as all parties interested were in fact before the Court at the hearing, and were willing to convey, and a good title could be made independently of the *Partition Act*, 1868, the purchaser was bound to accept such a title, and could not rely upon the technical informality in the decree.

THIS was a suit instituted by an equitable plaint in the County Court of *Lincolnshire*, and transferred into the High Court of Chancery on the ground that the subject-matter of the suit was above the County Court limit.

William Wood, by his will, dated the 14th of January, 1844, gave and devised to his wife, *Elizabeth Wood*, all his real and personal estate and effects, whatsoever and wheresoever the same might be, for and during the term of her natural life, and after her death he gave and devised the same unto and equally amongst his children, whom he named and who were seven in number, their heirs and assigns, for ever, as tenants in common.

William Wood died on the 16th of March, 1845, and his wife died in 1863.

Of the seven children, three sons emigrated to *America* more than twenty years ago, and settled at *Burlington Flats, Oswego County, New York*, where two of them, who were plaintiffs in the plaint, continued to reside. *Samuel Wood*, the other of the three,

left *Burlington Flats* about seventeen years ago for *California*, and had never been heard of since, though inquiries had been made respecting him; and from his previous habits it was believed by the family that he would not have remained long without communicating with them if he had been alive.

The plaint was for the administration of the testator's estate, and sought, besides taking certain accounts, to have his real estate sold, and the proceeds divided amongst the children. It also prayed for a partition.

All the six remaining children were either Plaintiffs or Defendants to the suit, and a majority of them desired to have the real estate sold.

On the 7th of November, 1874, an order was made on the hearing of the plaint, and in the presence of all the six children, to the following effect:—

“1. That the property shall be sold by and under the direction of the Court.

“2. That the proceeds of the sale, after providing for the costs of all parties incidental to this suit, shall be divided amongst the parties entitled.

“3. That it be referred to the Registrar that proper inquiries may be directed with reference to *Samuel Wood*.”

The matter then went before the Registrar, and an affidavit of one of the testator's sons was brought in, which proved the above-mentioned facts as to the disappearance of *Samuel Wood*, and thereupon the real estate of the testator, which consisted of certain house property subject to a mortgage term of 1000 years, was sold by the direction of the Registrar without any certificate being made or the cause being brought into Court for further consideration. The sale produced more than £500, and the cause was in consequence transferred to the Court of Chancery.

The purchaser took out a summons in Chambers to annul the sale, on the ground that it was invalid, as having been made under the *Partition Act*, 1868, under a decree which left it to the Registrar to find whether all the parties interested in the estate were before the Court, and before any certificate as to the result of the inquiries.

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The summons was refused in Chambers, and the purchaser now moved to discharge the order refusing it.

Higgins, Q.C., and *Methold*, for the purchaser :—

Peters v. Bacon (1), so far as it supported the view that a sale might be made under the *Partition Act* before further consideration when all the parties interested were not before the Court at the hearing, has been overruled by later decisions; and it is now settled by *Powell v. Powell* (2) that the effect of the 9th section of the *Partition Act* is, that, whenever in a partition suit inquiries are directed by the decree as to the parties interested, the result of the inquiries must be certified before the sale is made. This view was followed in the case of *Mildmay v. Quicke* (3). Moreover, a title cannot be made by the mortgagee, who has only a chattel interest in the property.

Glasse, Q.C., and *Cozens-Hardy*, for the Plaintiffs in the suit :—

The facts proved by the affidavit shewed conclusively that there was a legal presumption that *Samuel Wood* was dead when the suit was instituted. There was also a presumption that he was dead without leaving issue : *Doe v. Griffin* (4); *Doe v. Wolley* (5). Therefore every person interested was before the Court at the time the decree for a sale was made; and there was nothing to prevent an absolute decree for a sale being made at the hearing.

[They also relied upon the conditions of sale as precluding the purchaser from taking the objection.]

Higgins, in reply.

MALINS, V.C. :—

This is an objection to a title of a most technical nature, and one unworthy of the occupation of the time of this or any other Court.

[His Lordship then stated the effect of the will, and continued :—]

There were seven children. One of them went to *America*

(1) Law Rep. 8 Eq. 125.

(3) Law Rep. 20 Eq. 537.

(2) Ibid. 10 Ch. 130.

(4) 15 East, 293.

(5) 8 B. & C. 22.

nineteen years ago, and has not been heard of for seventeen years. There is therefore a presumption that he died without issue, no one having claimed to be his child. The consequence is that his real estate vested in his eldest brother as his heir-at-law.

In that state of things, nothing would be more easy than to sell the real estate under a simple condition, providing that the vendors should not be put to prove strictly the death of *Samuel Wood* without issue.

To resort to the Court for a sale of the real estate was quite unnecessary. However, the suit was instituted, and a decree made, which, it is true, was not in proper form. But the decree having been made, an affidavit was brought in shewing that *Samuel Wood* had not been heard of for seventeen years, and that his habits were such that he would have communicated with his friends if he had been living. This was quite sufficient to allow the presumption that he was dead; and the decree was in fact made in the presence of all interested parties.

Although I am sorry to find that a good deal of technicality has been introduced into the construction of the *Partition Act*, and I think it desirable to get rid of technicalities as far as may be, I cannot think it possible that such an objection as this can be sustained when all parties interested are really before the Court, and a perfectly good title can be made independently of the Act.

A very similar point arose in *Cavendish v. Cavendish* (1), in which my decision was affirmed on appeal, and it was held that, though it appeared that a title could not be made strictly in accordance with the decree, yet inasmuch as a good title could in fact be made, it would be enforced against the purchaser. In that case there was some difference between the title stated and that actually proved; but I had all the parties before me who could set that right; and in the Court of Appeal a slight alteration was made in the mode of dealing with the purchase-money, which took away every appearance of difficulty.

It was argued that the result of the inquiry ought to have been certified before the sale was made. But I have had many partition suits in which there has been no preliminary order before the sale was directed. If, for instance, I had four persons all interested

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(1) Law Rep. 10 Ch. 319.

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—

in fee simple, and all before the Court, I should not have made any inquiry. It would be a ridiculous thing to direct an inquiry when all parties interested are actually before the Court; and in this case it is now shewn that the decree for the sale was made in the presence of all parties interested; and if there is any technical error in the decree, it does not affect the purchaser if he can get a good title to the property purchased by him. What he is entitled to is to have a good title, and the Court can unquestionably give him a good title by giving him a conveyance by all the parties interested.

Then it is said that he cannot have a title through the mortgage, because the mortgage is only for a term of years. It is quite true that a purchaser cannot be forced to take a chattel interest in any property, however long the term, when he has contracted to buy the fee. But here the entire reversion may be conveyed. However, it is not necessary to go into this matter. It is sufficient to say that the decree was made in the presence of all parties interested, and gives a perfectly good title.

Solicitors: *Sharpe, Parkers, & Co.; Hicks & Son.*

KING v. CORKE.

[1873 K. 24.]

V.-C. B.

1875

Nov. 10.

Practice—Wilful Default—Amendment of Bill at Hearing—Rules of Court,
1875, Order XXVII., rr. 6, 7.

A Plaintiff charged the Defendants with wilful neglect and default but did not allege any particular act of default. Issue having been joined in the suit before the 2nd of November, 1875, upon the cause coming on for hearing after that date:—

Leave was given to the Plaintiff, on his application, to amend the bill by charging some one or more act or acts of default, but on the terms that he should enter into no new evidence, and should pay the costs of the present hearing.

CAUSE.

Thomas King, an infant, filed the original bill by his next friend, against *Silas Corke*, *George Cronk*, and *Alfred Blackman*, stating that *Thomas King*, his father, by a deed dated in or about March, 1867, conveyed to the use of the Defendant *Corke* and *Job Palmer*, since deceased, certain freehold property upon trust for the Plaintiff and his brother *Samuel King*, and the survivor of them; that the Plaintiff was unable to state more particularly the details of the settlement, having no copy or abstract of it; that shortly after the date *Corke* entered into possession of the premises, and had never accounted to the Plaintiff for the rents and profits; that *Samuel King* died in 1871 an infant; that in or about 1870 *Corke* made a composition with his creditors under the *Bankruptcy Act*; that Plaintiff believed *Corke* had mortgaged the premises; that *Corke* alleged that he had expended £150 “in respect of the trust” created by the settlement beyond the rents received by him, and that such sum was still due; that the Plaintiff a few days ago discovered from advertisements that *Corke* had taken steps to sell the premises; and that his solicitor, upon inquiring for a copy of the settlement, was told by the solicitor acting for the vendors, that *Corke* had resigned the trusteeship, and had appointed *Cronk* and *Blackman* trustees in the place of the late *Palmer* and himself.

The bill charged that nothing was due to *Corke*, but that if he

2CLP. 154.6,
—733-4
4CLP. 77
7CLP. 15
10CLP. 77
12CLP. 537
17CLP. 724

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properly accounted for the rents received by him, he would appear to be a debtor; and that the appointment of new trustees was invalid; and prayed for an injunction to restrain the sale; that the trusts of the settlement might be carried into execution under the direction of the Court; for an account of the rents and profits of the premises "received by the Defendants, or by any or either of them," or by any other person by their order or for their use; for, if necessary, a change of trustees, and other relief.

The Defendants answered, setting out the trusts of the settlement, which were that the trustees should stand possessed of the premises, upon trust, amongst other things, "to collect and get in the several debts and sums of money" thereby assigned; that part of the freehold property was subject to a mortgage for £450, and had been sold by the mortgagee for a sum less than the mortgage debt; that the personal property of *King*, the father, was insufficient, and the trustees had been obliged to raise money on the security of the premises to pay secured and other debts; that the Defendant *Corke* had always been ready and willing to furnish an account if required; that there were debts of *King*, the father, to the amount of £75 18s. 2d. still unpaid; and that from the account scheduled to the answer it would appear that *Corke* had expended about £126 more than the rents received by him.

In the course of the year 1874 the Plaintiff attained twenty-one, and by an amended bill, dated the 5th of June, 1874, he stated as follows:—

"The moneys and other personal estate assigned by the said *Thomas King* to the Defendant *Silas Corke* and *Job Palmer*, and which they received, or but for their wilful default might have received and converted into money, were more than sufficient to satisfy all the debts of the said *Thomas King*;" and the prayer for an account was amended by the words, "and also an account of what the Defendants, or either of them, might, except for their wilful neglect or default, have received in respect of the said settlement."

Evidence was gone into, and the Defendant *Corke*, in his affidavit, set out statements of account of his receipts and payments.

The Plaintiff's father, who was in trade as a charcoal-burner

deposed that the debts due to him at the date of the settlement amounted to £274.

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Ince, Q.C., and *Cottrell*, for the Plaintiff:—

The result of the account, if taken as prayed, will be to shew *Corke* to be a debtor to, instead of a creditor of, the estate.

Kay, Q.C., and *Whitehorne*, for the Defendants:—

Upon these pleadings, as they stand, the Plaintiff is not entitled to an account on the footing of wilful neglect or default. He should allege and prove at least one act of default, according to the established rule: *Sleight v. Lawson* (1); *Massey v. Massey* (2).

Cottrell:—

If so, I ask leave to amend the bill under Order xxvii., Rule 6, of the *Judicature Act*, 1875.

Kay, Q.C., and *Whitehorne*, *contrà*:—

The Court will not direct an amendment at the hearing when the Plaintiff, having his eyes perfectly open to the issue, has not pleaded. The only materials that the Defendants can furnish are to be found in the schedule to the trustee's answer and in his affidavit, and these were before the pleader when he drew the amended bill; there has been nothing new—no surprise.

The language of the Order is discretionary—the amendment “may” be allowed.

In this suit replication was filed before the 2nd of November, 1875; hence the Court, though having a discretion, will follow the old practice, as in *Garling v. Royds* (3), where the former practice was followed, though the cause was still pending.

Davey, Q.C., and *Whitehorne*, for another party who had been made a Defendant by amendment.

BACON, V.C.:—

This application touches one of the many difficulties which must arise under the new statute.

As I read the Order, it means that if, when a case comes to the

(1) 3 K. & J. 292.

(2) 2 J. & H. 728.

(3) *Post*, p. 81.

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hearing, there seems to be a *prima facie* probability that the Plaintiff is entitled to some relief other than that which he has prayed for by his bill, the Court will give him leave to put his demand in a shape in which, if he should succeed on the merits of the case, he will be entitled to a decree.

26 D 733-4
In the case of *Watts v. Hyde* (1), Vice-Chancellor *Knight Bruce* at the hearing of the cause, finding that the facts appearing in evidence would have supported a more favourable case for the Plaintiff than that made by the bill—and one which, if unanswered by the Defendant, would entitle the Plaintiff to the relief actually prayed—gave the Plaintiff leave to amend the bill, but such amendment was not to extend or vary the prayer, and the Plaintiff was not to go into new evidence. This was accordingly done, and the Defendant put in an answer to the amendments. But, upon appeal against this order, Lord *Cottenham* thought the practice an innovation, and he discharged the Vice-Chancellor's order (2).

In the case before me the evidence suggests—I do not say proves—that the Plaintiff would have a case for charging the Defendant with wilful default, and the Plaintiff desires to put the record into such a shape as will enable him to make that particular charge. I must say I think I should be doing violence to this Act of Parliament if I were not to give the Plaintiff this leave; but the permission must be carefully guarded.

With regard to the case before Vice-Chancellor *Hall*, it is plain that each case as it arises must be decided upon its own circumstances; and in this instance I must act upon my own judgment.

The Plaintiff may charge any particular act of wilful default against the Defendants, or either of them, and the Defendants will be at liberty to answer such charge, and to go into evidence in support of such answer; but the Plaintiff must not go into new evidence. He says in effect that upon the evidence as it stands he is able to prove wilful default. I must take his representation in that respect as correct, and if that be so, he requires no further evidence.

I grant, therefore, the Plaintiff's application to this extent, but he must pay the costs of the present hearing.

The time within which the Plaintiff must amend will be four-

(1) 2 Coll. 368, 391.

(2) 2 Ph. 406, 409.

teen days, as prescribed by the 7th rule, if no special time be limited.

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Solicitors for Plaintiff: *W. Elgood.*

Solicitors for Defendants: *Vizard, Crowder, & Co.*, agents for *Holcroft & Co., Sevenoaks*; *Kingsford & Dorman*, agents for *Carnell, Sevenoaks.*

WHITFIELD v. LANGDALE.

V.-C. B.

[1873 W. 13.]

1875

Nov. 4, 5, 13.

Will—Falsa Demonstratio—Acreage “more or less”—Parcel—Occupation.

Testatrix, in exercise of a power in a marriage settlement, by will, dated in 1845, devised “All that and those messuage or tenement, houses, buildings, farm and lands, called *H.* . . . situate in the parish of *L.*, containing by estimation eighty acres more or less . . . now in the occupation of *J. C.* or his assigns,” to the use of the same *J. C.*, his heirs and assigns.

At the date of the will, a farm called *H.* was in the occupation of *J. C.* It contained nearly 175 acres, of which about eighty-nine were freehold in the parish of *L.*, about sixty-six were copyhold in the parish of *L.*, and the remainder were copyhold in an adjoining parish:—

Held, that not only the eighty-nine acres of freehold in the parish of *L.*, but the whole of *H.* farm, passed by the devise.

Testatrix also devised “All that messuage or tenement, barn and lands thereunto belonging, situate in the parish of *B.* . . .” called by the name of “*Claggetts and Sievelands*,” to the use of *J. W.*, his heirs and assigns.

This description was identical in terms with a description in a schedule to the settlement; and it was followed in the same schedule by descriptions of six other pieces of land. At the date of the will, and for many years before and after, all seven pieces of land were in one occupation, and known as “*Claygate Farm*”:—

Held, that all seven parcels passed by the devise.

Testatrix also devised “All that capital messuage . . . and farm-house, with the barns, buildings . . . gardens, orchards, lands . . . woods, wood-grounds, and appurtenances . . . commonly called *T.* . . . situate in the parish of *E. G.*, in the occupation of *A. B.*, his assigns or under-tenants,” to the use of the same *A. B.*, his heirs and assigns.

At the date of the will, *T.* farm was situate in two parishes, *E. G.* and *W.* The farm-house of *T.* was in *W.* parish, and part of the farm buildings was in the parish of *E. G.* All were then in the occupation of *A. B.*, except some woods which were kept in hand by the landlord, and never were in the occupation of *A. B.*:—

Held, that the farm-house, buildings, and all the lands of *T.* farm (except the woodlands, which fell into the residue), passed by the devise.

ADJOURNED SUMMONS.

By the marriage settlement, dated the 27th of May, 1844, of

V.-C. B. *Thomas Haire and Mary Ann Hick*, all and singular the freehold hereditaments comprised in the 1st schedule, and all other the freehold hereditaments (if any) over which *Mary Ann Hick* had any power of appointment, were appointed and granted—and all and singular the freehold hereditaments comprised in the second schedule, and all other the freehold hereditaments (if any) of which *Mary Ann Hick* was seised or possessed, were granted and released—and all and singular the copyhold hereditaments comprised in the said 2nd schedule, and all other the copyhold hereditaments (if any) of or to which *Mary Ann Hick* was seised or entitled, were covenanted to be surrendered—to the use of trustees and their heirs upon the trusts of the settlement.

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Amongst the trusts of the settlement was a trust in the events, which happened, of *Mary Ann Hick* dying in the lifetime of *Thomas Haire*, and of there not being any issue of the marriage, to convey the trust property, subject to the life interest of *Thomas Haire*, in trust for such person or persons for such estates and interests as *Mary Ann Hick* should, notwithstanding coverture, by her will have given or devised the same; and in default of any such gift or devise, upon trust for *Mary Ann Hick*, her heirs and assigns.

The 1st schedule to the indenture contained descriptions of lands not affecting the questions now argued.

The 2nd schedule was as follows :—

“ All that capital messuage or tenement and farm-house, and all those arable lands, tenements, meadows, feedings, pastures, woods, wood-grounds, and hereditaments whatsoever, commonly called or known by the name or names of *Tickeridge* and *Shelves*, or by whatsoever other name or names the same or either of them are or have been called or known, situate in the several parishes of *East Grinstead* and *Westhoathly*, or one of them, in the said county of *Sussex*, together with all and singular houses, edifices, buildings, barns, stables, gardens, orchards, and tofts, parcel of or belonging to the said capital messuage or tenement and premises, or any or either of them, with their and every of their appurtenances. . . . All which said capital messuage or tenement, farm, lands, hereditaments and premises, were formerly in the tenure or occupation of *Woodman* and *Fairhall*, and are now in the occupation of *William Woodman* or his assigns.

“And also all that farm called *Hookland*, and all houses and buildings, lands, tenements, and hereditaments, with the appurtenances, commonly called or known by the name of *Hookland*, or by whatsoever other name or names the same or any part or parcel thereof are, is, or have been called or known, situate in the parish of *Lindfield*, in the said county, containing by estimation eighty acres, more or less, formerly in the tenure or occupation of *Thomas Penfold*, but now of *John Coppard* or his assigns or under-tenants.

“And also all that messuage or tenement, barn, and lands thereunto belonging, situate in the parish of *Buxted*, in the said county, called or known by the name of *Claggetts* and *Sievelands*.

“And also all that other messuage or tenement, barn, water corn-mill, lands, meadows, pastures, woods, and underwoods, containing by estimation sixty acres, more or less, situate in the parish of *Maresfield*, in the said county.

(A.) “And also all that one parcel of land and wood-ground, with the appurtenances, in *Buxted* aforesaid, containing by estimation five acres and three roods of land, more or less, bounding to the highway leading from *Poundgate* to a messuage formerly of *John Wilmshurst*, the elder, to the north, to the lands called *Claggetts* to the south, and to the lands formerly of the said *John Wilmshurst* east and west.

(B.) “And also all that messuage or tenement, barn, garden, lands, tenements, and hereditaments called or known by the name or names of *Honies* and the *Bullets*, or by whatsoever other name or names the same or any part thereof is or are called or known, with all and singular the appurtenances, containing in the whole by estimation sixteen acres, more or less, situate in *Highurst Quarter*, in the said parish of *Buxted*, and bounded by the highway there leading from the forest of *Ashdown* to *Five Ashen Down* towards the west, to the lands formerly *Edward Wilson’s* towards the south, and to the lands formerly *Kilner’s*, and afterwards *Leader’s*, to the east.

(C.) “And also one croft of land lying over against the said messuage called *Honies*, known by the name of the *Little Croft*, containing by estimation one acre.

(D.) “And also one other piece of land called *Hawkin’s Croft*, containing by estimation two acres, more or less, bounding to the

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V.-C. B. said highway leading from *Ashdown Forest* to *Five Ashen Down*
 1875 towards the east, and to the lands formerly of *Goldsmith Hudson*
 ~~~~~ north, west, and south.

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(E. and F.) “ And also all those two several pieces or parcels of land, with the appurtenances, containing in the whole by estimation eighteen acres, more or less, commonly called or known by the name of *Ruspers* and the *Orknies*, or by whatsoever other name or names called or known, situate in *Buxted* aforesaid, one parcel whereof, called the *Ruspers*, containing by estimation ten acres, and bounding to the highway towards the north and west, and to lands formerly of the said *John Wilmhurst*, sometime *William Pettit’s*, towards the east, and the other parcel of land called the *Orknies*, containing by estimation eight acres, and bounding to the highway there towards the west, and to the lands formerly of the said *John Wilmhurst*, sometime the said *William Pettit’s*, towards the south, and to the lands formerly *Kilner’s*, and afterwards *Leader’s*, towards the east.

“ All which said last-mentioned messuages, lands, tenements, hereditaments, and premises, mentioned to be situate in the said parish of *Buxted*, were formerly in the tenure or occupation of *John Durrant*, and are now in the occupation of *Isaac Gilbert* or his assigns or under-tenants.

“ And the said messuage or tenement, water corn-mill, lands, wood-grounds, and premises mentioned to be situate in the said parish of *Maresfield*, were formerly in the tenure or occupation of *John Newnham*, Esquire, and are now in the occupation of *William Osborn* or his assigns or under-tenants.” . . .

No surrender of the copyhold premises to the trustees of the settlement was made.

*Mary Ann Haire* duly made her will, dated the 13th of December, 1845, and thereby, after reciting the settlement, and in express exercise of the power, she devised as follows:—

“ I devise all that and those messuage or tenement, houses, buildings, farm, and lands, with the appurtenances, called *Hookland*, or by whatsoever other name or names called or known, situate in the parish of *Lindfield*, in the said county, containing by estimation eighty acres, more or less, formerly in the occupation of

*Thomas Penfold*, but now of *John Coppard* or his assigns, unto and to the use of the said *John Coppard*, his heirs and assigns, for ever.

“I devise all that messuage or tenement, barn, and lands thereunto belonging, situate in the parish of *Buxted*, in the said county, called by the name of *Claggetts* and *Sievelands*, unto and to the use of my cousin *Joseph Wontner*, his heirs and assigns, for ever.

“I devise all that capital messuage or tenement and farmhouse, with the barns, buildings, stables, gardens, orchards, lands, meadows, feedings, pastures, woods, wood-grounds, and appurtenances whatsoever, commonly called *Tickeridge*, or by whatsoever other name or names called or known, situate in the parish of *East Grinstead*, in the said county, in the occupation of *William Woodman*, his assigns or under-tenants, unto and to the use of the said *William Woodman*, of *East Grinstead* aforesaid, farmer, his heirs and assigns, for ever.

“I devise all that farm and lands called *Hill End Farm*, situate in the parish of *Maresfield*, in the said county, unto and to the use of *William Osborne*, of *Maresfield* aforesaid, farmer, the tenant thereof, his heirs and assigns, for ever. . . .

“And as to all the residue of my real estate whatsoever and wheresoever, of or to which I am or may at the time of my decease be or become entitled in possession, reversion, remainder, or expectancy, or over which I have or may have power to direct or appoint, give, devise, or bequeath, I devise the same and every part thereof, with their appurtenances, unto and to the use of the said *Mary Ann Langdale*, her heirs and assigns, according to the nature and tenure thereof, respectively, absolutely, and for ever.”

*Mary Ann Haire* made a codicil to her will, which did not affect the present questions, and died on the 3rd of May, 1854.

The bill was filed on the 15th of January, 1873, by *Thomas Whitfield* and *Henry Percival Hart*, the trustees of the settlement, against the Rev. *John Langdale* and *Mary Ann* his wife, the latter being the residuary devisee and legatee under the will, to have the trusts of the settlement carried into execution under the direction of the Court.

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The questions were the following :—

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1. As to *Claggett's* or *Claygate Farm*, and *Tickeridge* :

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In the second part of the 2nd schedule to the certificate were set forth the properties which the Chief Clerk had found to be those comprised in the above devise to *Joseph Wontner*. These consisted of twenty-five parcels of land, together 75A. 1R. 16P., which were headed in the schedule, “Freeholds; *Claygate Farm*.”

The Defendants, the residuary legatee and her husband, sought to vary this finding by striking out from the schedule twelve of these parcels of land, containing together 38A. 18P., which, as they contended, were not included in the gift to *Joseph Wontner*, and fell into the residue.

These twelve parcels were identical with six parcels in the 2nd schedule to the settlement, which are marked above with the letters A to F; and the contention of the applicants on this (the first) summons, was that the gift to *Joseph Wontner* was sufficiently answered by the lands which in the settlement were called “*Claggetts* and *Sievelands*,” consisting of thirteen parcels, containing 37A. 38P. only, exclusive of the lands A to F.

The receiver of the rents, *Mr. Baker*, said that at the date of the will the above 75A. 1R. 16P., together with the 10A. 29P., fourthly below mentioned, making together about 85 acres, were occupied together as one farm. *Mrs. Clifton*, whose father, *Isaac Gilbert*, was tenant from 1814 to 1850, whose mother was tenant until 1871, and whose husband, *Charles Clifton*, was the present tenant, said that all that time they had been occupied as one farm. Other evidence on the subject is summed up in the judgment.

As to *Tickeridge* :

In the third part of the 2nd schedule were set forth the lands which the Chief Clerk had found to be comprised in the devise to *William Woodman*. These were all headed “Freeholds,” and comprised one parcel of land, 1A. 3R. 3P., headed “In the parish of *East Grinstead* ;” seventeen parcels, together 85A. 14P., headed “*Tickeridge Farm* ;” and twenty-two other parcels, together 116A. 2R. 24P., headed “In the parish of *Westhoathly, Tickeridge*.” Of these latter, one, consisting of thirty-two perches, was described as “House and Premises.”

The Defendants, the residuary legatee and her husband, by the same (first) summons, sought to vary this finding by striking out of the schedule all the last-mentioned twenty-two parcels, except the "house and premises;" their contention being that, with the exception of the farm-house and premises, of which the farm-house and part of the premises were in *Westhoathly* parish, the other and larger part of the premises being in *East Grinstead*, none of the lands in *Westhoathly* passed by the devise to *William Woodman*.

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The evidence whereby it was shewn that these properties (with the exception of the woodlands below mentioned) were held in one occupation, is commented on in the judgment.

## 2. As to *Tickeridge* and *Hill End Farms* :

The Chief Clerk had set forth in the 6th, 7th, 8th, 9th, and 10th parts of the 2nd schedule to the certificate, the properties which he had found to be comprised in the devise of the residue of the testatrix's real estate. The 6th part of the 2nd schedule comprised two parcels of freehold land, making together 51A. 36P., described as "*Tickeridge*," in the parish of *Westhoathly*.

The trustees of *William Woodman's* will by a second summons sought to vary the certificate by striking out the properties comprised in the 6th part of the 2nd schedule to the certificate, and inserting them in the 3rd part of the 2nd schedule; in other words, they claimed 51A. 36P. of *Tickeridge Farm* in *Westhoathly* parish, which the Chief Clerk had treated as having fallen into the residue.

The evidence went to shew that these two parcels of land, being both woodlands, were kept in hand by *Mary Ann Haire*, and were never in *William Woodman's* occupation.

## As to *Hill End Farm* :

The 8th part of the 2nd schedule to the certificate comprised one parcel of freehold land in the parish of *Buxted*, called "*The Wood*," described as "wood," and containing 30A. 2R. 22P.

*William Osborne*, by the same (second) summons, sought to vary this finding by striking out this parcel from the 8th part of the 2nd schedule, and entering it in the 4th part of the same

V.-C. B. schedule, which contained descriptions of lands which the Chief Clerk had found to be the properties comprised in the above devise to him (*Osborne*).  
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This piece of wood, like the former, had been kept in hand by the testatrix, and was never in *Osborne's* occupation.

### 3. As to *Hookland* :

In the 9th part of the 2nd schedule were set forth five parcels of copyhold land, comprising 18A. 3R. 25P., described as situate "in the parish of *Wivelsfield* and manor of *Southmallig Lindfield*;" and in the 10th part of the same schedule were set forth eighteen parcels, comprising 65A. 3R. 29P. of copyhold land, described as situate "in the parish of *Lindfield* and manor of *Balneth*."

*Charles Coppard*, the heir-at-law and customary heir of *John Coppard*, by a third summons sought to vary the certificate by striking out the lands comprised in the 9th and 10th parts of the 2nd schedule, and having them inserted in the 1st part of the 2nd schedule, which comprised the properties which the Chief Clerk had found to be those that were devised to *John Coppard* in fee, being twenty-three parcels of land, comprising 88A. 3R. 16P., headed "Freeholds." These freeholds were all situate in the parish of *Lindfield*.

In other words, he contended that the copyhold portion of a farm, which at the date of the will was called *Hookland*, being nearly 175 acres in extent, rented of the testatrix and her father at one rent, passed with the freehold part of the same farm under the devise, though part of the copyhold portion was not in *Lindfield*, but in an adjoining parish.

### 4. As to *Claggetts* :

In the 7th part of the 2nd schedule were set forth three parcels of land, called *Honey's Gill*, *Honey's Field*, and *Honey's Wood*, comprising 10A. 29P., headed "Freehold, in the parish of *Buxted*, *Claygate Farm*."

The trustees of the will of *Joseph Wontner*, by a fourth summons, sought to vary the certificate by striking out the properties comprised in this 7th part of the 2nd schedule, and having them inserted in the 2nd part of the 2nd schedule; their con-

tention being that this portion of *Claygate Farm* also passed under the devise in the will to *Joseph Wontner*.

*Kay*, Q.C., and *Freeman*, for the Defendants, the applicants on the first summons :—

As to *Claggetts* and *Sievelands*, we ask to exclude lands A to F in the settlement from the devise to *Joseph Wontner*.

If there is a subject which satisfies all parts of the description, that subject passes, and nothing more. It may be that one part of the description, standing alone, might include other lands than those which satisfy the whole description: such other lands will not pass. The devise speaks of “all that messuage . . . barn, and lands . . . situate at *Buxted* . . . called by the name of *Claggetts* and *Sievelands*.” These words are identical with the description in the schedule, which, it is admitted, refers to the lesser quantity. No evidence is admissible to enlarge the meaning of these words. *Woodden v. Osbourn* (1); *Stone v. Greening* (2); *Hall v. Fisher* (3); *Doe v. Bower* (4); *Webber v. Stanley* (5); *Pedley v. Dodds* (6); *Bacon’s Tracts* (7).

In *Goodtitle v. Southern* (8), which may seem to be the other way, the word used was “farm.” In *Hardwick v. Hardwick* (9), the main description was “known by the name of . . .”

In this case the testatrix does not say all that “farm” or estate,” but all that “messuage or tenement.”

A residuary devise is now as much a specific devise as any other.

As to *Tickeridge*, we claim everything in *Westhoathly* except the farm-house and premises.

The testatrix may have wished to restrict her gift to *W. Woodman* of *Tickeridge Farm* to that part of it which lay in *East Grinstead*.

*Jackson*, Q.C., for *Joseph Wontner’s* representative :—

The rule laid down in *Jarman on Wills* (10) is, that if the testator describes the subject of the devise as an entire subject, and

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(1) Cro. Eliz. 674.

(2) 13 Sim. 390.

(3) 1 Coll. 47.

(4) 3 B. & Ad. 453.

(5) 16 C. B. (N.S.) 698.

(6) Law Rep. 2 Eq. 819.

(7) Page 76 (Rule 13).

(8) 1 M. & S. 299.

(9) Law Rep. 16 Eq. 168.

(10) 3rd Ed. vol. i. p. 747.

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in terms of sufficient certainty, as his farm called *A.*, or his house in a particular place, or his *B.* estate, or the like, then, although he adds a clause descriptive of the whole, but which is true only of a part, the entire subject may pass: *Goodtitle v. Southern* (1); *Hardwick v. Hardwick* (2).

This is not the case of a sale of land, and the strict rules which would apply to a contract are not applicable to a devise.

As to *Tickeridge*, if the Defendants admit that the house in *Westhoathly* passes, they can scarcely exclude the farm in the same parish, of which it is the farm-house: *Doe v. Earl of Jersey* (3).

*Kay*, in reply.

*Jackson*, Q.C., and *Millar*, for *William Woodman's* trustees, and *William Osborne*, the applicants on the second summons:—

The words of the devise in each case are wide enough to pass these woodlands: *Paul v. Paul* (4).

*Jackson*, Q.C., and *Laing*, for *Joseph Wontner's* trustees, in support of the fourth summons:—

These three parcels of land must go with the rest of *Claygate* farm.

*Kay*, Q.C., and *Freeman*, for the Defendants, opposed the two last-mentioned summonses:—

It is not *Claygate* farm that is devised; it is one “messuage or tenement, barn, and lands thereunto belonging, called *Claggetts* and *Sievelands*”—certain specific lands—whether in the same occupation as *Claygate* farm or not is immaterial.

The woodlands do not answer the last part of the description—viz., “now in the occupation of *John Coppard*.” If that part of *Tickeridge* which is in *Westhoathly* passed because it was in the occupation of *John Coppard*, it follows that the woodlands, which were not in his occupation, did not pass; and if, as we say, the *Westhoathly* part of *Tickeridge* did not pass, the woodlands, which were part of *Westhoathly*, certainly did not pass.

(1) 1 M. & S. 299.

(2) Law Rep. 16 Eq. 168.

(3) 1 B. & A. 550.

(4) 1 W. Bl. 255.

*Swanston*, Q.C., and *W. Renshaw*, for *Charles Coppard*, supported the third summons :—

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The testatrix has given the whole of *Hookland Farm*, but she has added a line of *falsa demonstratio* at the end. She has described it as situate in the parish of *Lindfield*, whereas it was situate in that parish and in another ; and she has described it as being “eighty acres, more or less,” whereas it was about 175 acres. The description “all that and those messuage or tenement, houses, buildings, farm, and lands, called *Hookland*,” if it stood alone, would admittedly carry all the reputed parts of a farm : *Goodtitle v. Southern* (1) ; and would let in evidence to shew what those reputed parts were ; and it is a rule without exception, that when there has been a clear gift of any entire property by general words, that gift cannot be cut down by erroneous numerical description. It is immaterial whether the error be in the number of acres, the number of pounds of rental, as in *Down v. Down* (2), or the number of pounds payable for quit rent, as in *Roe v. Vernon* (3). Error is more likely to creep into figures than into general description, and therefore the general description prevails, and the figures are rejected. Words of suggestion or affirmation (which these are, and not of restriction or limitation,) cannot do away with the generality of a devise. But here, as to the acreage, strictly speaking, there is no inaccuracy ; 175 acres is “more” than eighty—upwards of twice as much more ; but, treating the phrase as being, according to common parlance, inaccurate, it cannot affect the generality of the former description.

Of the force of the words “more or less” there is an example in *Harrison v. Hyde* (4).

The testatrix’s will seems to shew two general intentions—one, that all lands in the same occupation should go together ; the other, that they should go to the tenants who were in occupation. Everything, therefore, in *John Coppard’s* occupation would go to him.

*Mr. Northmore Lawrence*, for an incumbrancer.

(1) 1 M. &amp; S. 299.

(3) 5 East, 51.

(2) 7 Taunt. 343, and see the argument, p. 348.

(4) 4 H. &amp; N. 805.

V.-C. B. *Kay*, Q.C., and *Freeman*, for the Defendants, opposed :—

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If there had been a simple devise of *Hookland*, and no more, there must have been an inquiry what was included in *Hookland*; and all that was in it would have passed. But where a farm is described by situation and acreage, that description must not be exceeded.

If the words following the gift of *Hookland* had not been words of limitation and restriction, they might possibly be treated as a *falsa demonstratio*; not otherwise: *Roe v. Vernon* (1), referring to *Vicars Choral of Litchfield v. Ayres* (2); and see Lord *Ellenborough's* remark in *Doe v. Earl of Jersey* (3). In *Harrison v. Hyde* (4) it was five acres more or less; here it is eighty.

These particular eighty acres can be easily identified with a corresponding description in the settlement.

In *Winch v. Winchester* (5) Sir *W. Grant*, M.R., said that the effect of the words “more or less” had never been absolutely fixed by decision; and as there was in that case an additional vagueness arising from the use of the words “by estimation,” he would not allow the purchaser any compensation. But there the difference was only five or six acres out of forty-one; and where, as in *Portman v. Mill* (6), the description was, “containing by estimation 349 customary acres or thereabouts, more or less,” and 349 customary acres were found to be less by 100 than as many statute acres, it was held that the words would not cover so great a deficiency.

*Swanston*, in reply :—

The cases of *Winch v. Winchester* and *Portman v. Mill* are cases of contract, and have no application.

*Waller*, Q.C., and *Kingdon*, for the Plaintiffs.

Nov. 13. BACON, V.C. :—

Several questions have been raised upon the summonses lately argued before me, whereby it is sought to vary the certificate of

(1) 5 East, 51, 65.

(2) Sir *W. Jones*, 435.

(3) 1 B. & A. 550, 557.

(4) 4 H. & N. 805.

(5) 1 V. & B. 375.

(6) 2 Russ. 570.

the Chief Clerk made in this suit. Each of them calls for a separate consideration, but each and all of them depend upon the construction of the will of the testatrix, *Mary Ann Haire*.

In considering that construction, regard must be had to the circumstances affecting the testatrix at the time when it was made. She had married in the year 1844, and by the settlement then executed certain freehold and copyhold estates were settled upon trust (*inter alia*), in the event of there being no issue of the marriage (which event happened), for such purposes and for such estates as she should by will appoint. Two schedules formed part of the settlement, which schedules contained descriptions of the several estates and parcels therein comprised. In December, 1845, the testatrix made her will, in which she recited the settlement, and proceeded, in exercise of the power, to devise the several estates to which it extended. The decree in this suit ordered the execution of the trusts of the will, and directed an inquiry what properties were comprised in the settlement, and also an inquiry what properties respectively were comprised in the several devises and appointments as contained in the will.

These inquiries having been made, the conclusions stated in the certificate are the subjects of dispute between some of the specific devisees and the residuary devisee, who is also to be considered a specific devisee of all the estates which are not otherwise disposed of. It is contended by the former that the testatrix meant more than a strict literal construction of her words would express. The latter contends that, in construing the will, the Court is bound to give effect to the words used as they stand, and that no interpretation beyond those words is lawful, and no extrinsic facts can be resorted to for the purpose of arriving at such interpretation.

Many cases have occurred in which the principles applicable to construction of wills, involving questions of a kind similar to those which arise in this case, have been considered. The difficulty and nicety of such questions have at all times been felt. Some of the most important of the cases have been referred to in the course of the argument, and although the particular expressions in other wills (which are never exactly similar to those in which subsequent questions have presented themselves) cannot be relied on as furnishing an infallible guide for the solution of further questions, yet

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rules have been laid down which the Courts have at all times to regard as authoritative.

Thus it has been established as what must now, by reason of its antiquity, and of the observance which has been paid to it in many subsequent cases, be regarded as an axiom, that when a devise is made in terms which describe and apply specifically to a definite subject, the operation of that devise cannot be extended beyond the very terms in which it is expressed, nor can extrinsic evidence be resorted to for the purpose of shewing that something different from the description was intended by the testator.

There have, however, occurred cases in which the expressions of the devise have been ambiguous, or otherwise defective and uncertain. In such cases a new and different rule is required, and has been established. In the words of a recent decision by Lord *Selborne* in *Hardwick v. Hardwick* (1), "If the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly, in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded." This latter rule—no less positive and cogent than that first mentioned—is by no means at variance with that primary rule of interpretation.

Upon the strength of this second rule, it has been argued that the words of the several devises which are now in question shew that the testatrix meant more than would be comprehended within a narrow and strict interpretation of the words she has used; and reliance was placed upon Lord *Selborne's* decision in the above case, in which he reviewed, with most elaborate care and attention, the more important of the authorities applicable, more or less, to the question before him. It is unnecessary for me to refer to them more particularly, as all of them have been referred to in the argument before me. I cannot, however, discover in the judgment then pronounced any disposition on the part of that most learned and patient Judge to depart from or to call in question the first rule to which I have adverted.

The case before Lord *Selborne* in his judgment admitted of the

(1) Law Rep. 16 Eq. 168, 175.

application of the second rule. It arose upon a devise in these terms: "All that my share and interest in the messuages, lands, and premises called or known by the name of the *Dyffrydd* and the *Little Dyffrydd*, situate in the parish of *Kinnerley*, in the county of *Salop*, now in the occupation of *John Edwards*." It had been ascertained by the Chief Clerk's certificate that "parts of the property described as *Dyffrydd* are situate in the parish of *Llandisilio*, in the county of *Montgomery*, and are, except where they respectively abut on the river *Virnwy*, surrounded by, and are thrown into, and form part of, enclosures in the parish of *Kinnerley*, in the county of *Salop*; there are no boundaries between such parts of the said lands in the said two counties respectively. Such parcels of land in the parish of *Llandisilio* have for forty-one years been deemed and reputed and occupied as part of the lands and premises known as *Dyffrydd*, and were, at testatrix's death, in the occupation of *John Edwards*, the then tenant of the said property called *Dyffrydd*, and are now in the occupation of *Thomas Jones*, the present tenant of *Dyffrydd*." The question, therefore, was, whether the two closes in the parish of *Llandisilio*, which were misdescribed as to the actual locality, and "*Paper Mill Meadow*," which was misdescribed as to the tenant in whose occupation it was, passed under the devise of lands "called or known by the name of the *Dyffrydd* and the *Little Dyffrydd*, situate in the parish of *Kinnerley*, now in the occupation of *John Edwards*." Lord *Selborne* in construing the will considered that the leading words of description were the lands "called or known by the name of the *Dyffrydd* and the *Little Dyffrydd*," and that the testatrix, having by these leading words described the subsequent matter of the gift, went on to speak of the accidents of the situation and the state of occupation, but did not thereby diminish the effect of the description she had given of the subject of her devise, which was a compact estate, and he therefore decided that the whole of the lands passed.

In the present case, the inquiries directed by the decree have been duly made, and four summonses have been taken out disputing the findings in the certificate.

The first of these (following the order in the certificate) is that of *Charles Coppard*, the representative of *John Coppard*, one

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of the devisees, to whom the testatrix made the devise following:—  
 [His Lordship read the words of the devise of *Hookland* to *John Coppard* contained in the will, and continued:—] By the certificate it was found that the properties comprised in this devise are set forth in the 1st part of the 2nd schedule, comprising lands amounting in the whole to 88A. 3R. 16P. Of this finding *Charles Coppard* by his summons complains, and insists that the devise to *John Coppard* includes in addition the particulars set forth in the 9th and 10th parts of the 2nd schedule. Such additional particulars consist of copyhold lands in the parish of *Wivelsfield* and manor of *Southmallng*, *Lindfield*, comprising 18A. 3R. 25P., and of other lands in the parish of *Lindfield* and manor of *Balneth*, comprising 65A. 3R. 29P., which admeasurements greatly exceed the amount of acreage mentioned in the said devise.

In considering this particular devise I am compelled to refer to the settlement to which the testatrix refers in her will. The estate called *Hookland* is thus described:—[His Lordship read the description of *Hookland* comprised in the 2nd schedule to the settlement as above stated, and continued:—] In the same settlement, but in a separate category, are described several copyhold estates of the testatrix:—[His Lordship read the descriptions of the copyhold lands, tenements, and hereditaments described in the 2nd schedule to the settlement above stated, and continued:—] And these, or the greater part of them, are those lands which *Charles Coppard* seeks by his summons to have added to the parcels of which the certificate finds the devise of *Hookland* to consist. Now, it is certain that, at the date of the will, there was no farm and lands called "*Hookland*" in the parish of *Lindfield*, containing eighty acres, in the occupation of *John Coppard*. Evidence being therefore admissible, several witnesses have proved that there was a farm, part of which was in *Lindfield* and part in an adjoining parish, containing 175 acres, which farm was known as *Hookland*, and for sixty years past had been called by the name of that, and by no other name. One rent of £40 a year was paid for that entire farm, and receipts for such rent by the testatrix and her father, who preceeded her in title, were produced. It was further proved that the lands mentioned in the 9th and 10th parts of the 2nd schedule to the certificate (making up, with eighty acres in *Lindfield*, the whole

175 acres of which *Hookland* consists) had, during the period before mentioned, been held with and as part of *Hookland*. Upon this evidence, which is uncontradicted, and which I see no reason for distrusting, I am of opinion that, notwithstanding the great difference in the admeasurement somewhat vaguely mentioned in the will, and the description of *Hookland*, which is plainly erroneous, the whole farm, consisting of 175 acres, passed to the devisee, *John Coppard*.

Following the order of the certificate, it is thereby found that the 2nd part of the 2nd schedule contains the particulars comprised in the devise to *Joseph Wontner*, which is in these terms:—[His Lordship read the words of the devise to *Joseph Wontner* contained in the will, and continued:—] The settlement mentions this property thus:—[His Lordship read the description of the same lands as contained in the schedule of the settlement, and continued:—] the terms in each instrument being almost identical. Of this finding the residuary devisee complains, and insists that the devise extends no further than to the lands called *Claggetts* and *Sievelands*, and seeks by the summons to have the certificate varied by striking out certain parcels which were not part of *Claggetts* and *Sievelands* at the date of the settlement. This contention the residuary devisee rests upon the words of the devise, and upon the fact that it appears, from the settlement itself, and immediately following the description I have quoted, that the testatrix was possessed of other lands mentioned by descriptions which appear to treat them as being different from “*Claggetts* and *Sievelands*,” of which other lands one is a parcel of land and wood ground “bounding . . . to the north to the lands called *Claggetts*,” others called by the names of *Honies* and *The Bullets*, and several other appellations different from “*Claggetts* and *Sievelands*.” The question being, then, as to what the testatrix meant by the mesuage and lands called “*Claggetts* and *Sievelands*,” on the part of the representatives of the specific devisee, *Joseph Wontner*, it is proved by the receiver of the rents and tithes of the parish of *Buxted* for the last thirty-four years, that the whole of the parcels in the 2nd part of the 2nd schedule have, during the whole period mentioned, been occupied together as one farm—have been known and described by the name of “*Claggetts* or *Claygate Farm*.”

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*Elizabeth Clifton*, the daughter of *Gilbert*, who was the tenant of the farm called *Claygate* at the respective dates of the settlement and of the will, and whose knowledge upon the subject extends over forty years, deposes to the latter effect, as does also another witness named *Wildish*, whose knowledge extends over sixty years. The witnesses also prove that the additional or different appellations of lands mentioned in the settlement did and do describe parcels which have at all times within their knowledge been held with and formed part of the *Claggetts Farm*, and that they were so held with the knowledge of the testatrix. The description in the will cannot, therefore, be said to fit with perfect accuracy that which the residuary devisee insists that *Claggetts* consisted of. Evidence being therefore admissible for the purpose of ascertaining to what subject the terms of the devise are applicable, it appears to me that the evidence I have referred to, being uncontradicted, must prevail, and that the finding of the certificate is in this respect quite correct.

And this principle must apply also to a summons by *Wontner's* representatives, by which they claim to have the parcels which the certificate has inserted in the 7th part of the 2nd schedule added to the 2nd part of the same schedule, for the evidence appears to me to establish that *Honey's Gill*, *Honey's Field*, and *Honey's Wood* form part of the tenement which is described in the 2nd part of the 2nd schedule as *Claygate Farm*, and the certificate must be varied accordingly.

By the same summons of the residuary devisee she complains that the lands in the 3rd part of the 2nd schedule, and therein mentioned to be in the parish of *Westhoathly*, have been improperly included by the certificate in the devise made by the will to *William Woodman*. That devise is in these terms:—[His Lordship read the words of the devise to *William Woodman*, as above, and continued:—] The description in the settlement runs thus:—[His Lordship read the description, and continued:—] The settlement, it will be observed, speaks of hereditaments known by the name *Tickeridge* and *Shelves*, situate in the several parishes of *East Grinstead* and *Westhoathly*. The devise mentions only *Tickeridge* and the parish of *East Grinstead*. The residuary devisee has argued that the subject of the devise is clearly de-

finished by the reference to the parish of *East Grinstead*. It is not disputed that the messuage which is called *Tickeridge* passed by that specific designation, although it is not situate within *East Grinstead*, but is in *Westhoathly*; but yet it is insisted that all the other lands situate in *Westhoathly* are not included in the devise, and the residuary devisee therefore seeks to have the certificate varied by omitting from the 2nd schedule all the property of the testatrix in *Westhoathly*, except only the capital messuage called *Tickeridge*. The evidence of *William Woodman*, the son of the specific devisee, is to the effect that he has resided at *Tickeridge Farm* for more than fifty years; that it has, during all that period, consisted of 279 acres, of which 183 are in *Westhoathly* and eighty-six in *East Grinstead*; that the whole of the farm-house is in *Westhoathly*, but the great portion of the farm buildings is in *East Grinstead*; and that it was so occupied by his father. A labourer named *Thomas Simmonds*, who has known the farm from his childhood, and who has worked upon it for twenty-four years, deposes to the like effect, and that the boundaries have been the same for more than fifty years. Upon this evidence I am satisfied that the finding in the certificate is correct, and that the summons by which that finding is disputed must be dismissed.

Another contention is raised by a summons on the part of the representatives of *William Woodman*, who insist that the certificate is erroneous, inasmuch as it ascribes to the residuary devisee certain woodlands, comprising 51A. 0R. 36P., in the parish of *Westhoathly*, which the representatives of *Woodman* claim to belong to and form part of *Tickeridge*, and to be included in the devise to *Woodman*, and which they say ought to be included in the 3rd part of the 2nd schedule.

A like contention is raised by the same summons by *William Osborne*, of *Maresfield*, the devisee of the property mentioned in the 4th part of the schedule to the certificate by the description of "*Hill End Farm*, in the parish of *Maresfield*," who insists that a wood, consisting of thirty acres, which by the 8th part of the same 2nd schedule is stated to form part of the residuary devise, forms part of the *Hill End Farm*, and ought therefore to be added to the parcels contained in the 4th part of the same schedule as having passed to *William Osborne*.

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The residuary legatee disputes both of these claims; first, on the ground before mentioned, that nothing out of the parish of *East Grinstead* passed by devise to *Woodman*, of which I have disposed; and further, because the woodlands so claimed by *Woodman* and *Osborne*, and mentioned in the 6th and 8th parts of the schedule, were not in the occupation of either *Woodman* or *Osborne*, as tenants or otherwise, but were retained in hand by the testatrix, or by the trustees of her settlement.

I am of opinion that there is no ground for this contention on the part of *Woodman* and *Osborne*. It is clear upon the evidence, and by the admissions of the specific devisees themselves, that from the lands in their respective occupations the woodlands in question had been actually severed, and taken in hand by the testatrix, who was the owner of them. They are not included in the words by which the several devises are expressed, nor can they by any reasonable construction be held to be within the meaning of the gifts.

In the course of the discussion it was more than once suggested, in favour of the specific devisees, that it was the obvious intention of the testatrix to give to the several devisees, her tenants, the lands of which they had been long in the occupation. Of course no such suggestion is entitled to any weight in considering the true construction of the will; but if it were well founded, it clearly could not help the contention of the devisees as to these woodlands, which had for several years ceased to be included in their respective tenancies.

That disposes of the four summonses which were argued before me.

Solicitors for Defendants, the applicants on the first summons: *Senior, Attree, & Johnson*, agents for *Husey-Hunt, Currey, & Nicholson, Lewes*.

Solicitors for Applicants on the second summons: *Smith, Senning, & Croft*, agents for *Pearless & Sons, East Grinstead*.

Solicitor for Applicants on the third summons: *William Clarke*.

Solicitors for Applicants on the fourth summons: *Terrell, Honey, & Terrell*.

Solicitors for Plaintiffs: *Palmer, Bull, & Fry*.

GARLING *v.* ROYDS.

[1875 G. 3.]

V.-C. H.

1875

Practice—Judicature Acts—Default in answering—Pending Suit—Attachment Nov. 5, 6.
—Rules of Court, 1875, Order XLIV.

In a suit pending on the 1st of November, 1875, attachment for want of answer may issue against a Defendant under the old practice.

THIS was a pending suit in which replication had not been filed or notice of motion given before the 1st of November, 1875, when the Judicature Acts came into operation, and was consequently one in which, according to the general directions given by the Judges of this Division on the 3rd instant, the proceedings were to continue up to one or other of those steps under the old practice.

The Defendant was in default for not having answered, and the Plaintiff was desirous of issuing an attachment against him without notice under the old practice. The record and writ clerks, however, declined to issue the writ under the old practice, on the ground that the Rules of Court, 1875, Order XLIV., rule 2, had varied the old practice, in providing that "no writ of attachment shall be issued without leave of the Court or a Judge, to be applied for on notice to the party against whom attachment is to be issued."

Whitehorne, for the Plaintiff, accordingly applied for the direction of the Court that the attachment might issue under the old practice.

HALL, V.C.:—

This is a matter of importance, as affecting the liberty of the subject, and I shall consult the other Judges before answering the application.

Nov. 6. HALL, V.C.:—

Having consulted one of the other Judges, I am prepared to direct that, this being a pending cause, attachment for want of answer may issue under the old practice.

Solicitors: *Iliffe, Russell, & Iliffe.*

Book 59
Part 445, 8
3rd D 140
191-2-3.

V.-C. H.

In re ATKINS' ESTATE.

1875

Nov. 11.

*Practice—Judicature Acts—Rules of Court, 1875, Order L.—Petition—Abatement
—Death of Petitioner—Continuance of Petition by Executors of Petitioner.*

Where a sole Petitioner dies after an order made on the Petition directing inquiries, and whilst those inquiries are pending, the Court will order the Petition to be continued and carried on by the representatives of the Petitioner.

THIS was a Petition for payment out of a fund paid into Court under the *Lands Clauses Consolidation Act, 1845*, to a person claiming to be absolutely entitled to it.

After an order had been made directing certain inquiries, and pending those inquiries, the sole Petitioner died, having by her will devised all her real estate to her executors.

The will having been proved,

Strickland, for the executors of the Petitioner, applied *ex parte* for an order to amend the Petition by stating the death of the Petitioner, and substituting her executors as Petitioners. He submitted that it appeared from Order L. of the new Rules of the Court under the Judicature Acts, that the Petition could not be revived under the old practice, as in *In re Stagoll* (before the Master of the Rolls, June 6, 1867⁽¹⁾); and he referred to *In re Wilkinson's Settled Estates* (1).

HALL, V.C. :—

Under the new practice there is no abatement; and an order having been made on the Petition, I cannot give leave to amend; but I have no difficulty in ordering that the Petition shall be continued and carried on by the executors of the late Petitioner, the necessary evidence being of course produced.

Solicitor: *J. A. Bertram.*

(1) Law Rep. 9 Eq. 71.

(as per W.N. (1867) 179: 2842 15402974

PERKINS *v.* SLATER.

[1875 P. 156.]

V.-C. H.

1875

Nov. 11.

Practice—Judicature Act, 1873, s. 22—Pending Cause—Continuance under old Practice.

WLD 464

The Court will not, on an *ex parte* application, direct proceedings in a pending suit to be continued under the old practice.

THIS was a light and air suit, in which an interlocutory injunction had been granted during the last long vacation.

J. R. Griffith, for the Plaintiff, now applied under sect. 22 of the *Judicature Act*, 1873, *ex parte*, for leave to serve notice of motion for decree, and to use at the hearing, as his evidence in chief, the affidavits filed on behalf of the Plaintiff upon the motion for the injunction. These affidavits were numerous, expense would be saved, and the Defendant could not be prejudiced.

HALL, V.C. :—

I cannot take any application of this nature *ex parte*, and my impression is, that, unless an arrangement is made by the parties, or special cause shewn on notice, the proceedings must be under the new practice.

Solicitors: *Emmet & Son.*

V.-C. H.

CULLEY v. BUTTIFANT.

1875

[1875 C. 204.]

Nov. 18.

Contempt of Defendant—Non-Execution of Attachment—Rules of Court, 1875, Order XXIX., r. 10—Answer—Defence—Leave to take Bill pro confesso under old Practice—Cons. Ord. XXII., r. 2.

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Default in answering in a suit pending on the 1st of November, 1875, is not "default in delivering a defence" so as to entitle the Plaintiff to set down the action on motion for judgment under the Rules of Court, 1875, Order XXIX., rule 10.

Where attachment for want of answer had been issued against a Defendant in such a suit, and the sheriff reported that the Defendant was old and paralyzed, and that he could not execute the attachment without danger to life, the Court directed that the suit might be continued under the old practice, so as to enable the bill to be taken *pro confesso* under Cons. Ord. XXII., rule 2, and held that, under the circumstances, the actual execution of the writ of attachment might be dispensed with.

THE bill in this suit was filed in June last against a sole Defendant. Interrogatories were filed in due course, and several extensions of time to answer were obtained, the last of which expired after the 1st of November, 1875. Attachment was then issued, but the sheriff reported that the Defendant was advanced in years and paralyzed, and that he could not execute the attachment without danger to life.

Cozens-Hardy, for the Plaintiff, applied, under the Rules of Court, 1875, Order XXIX, rule 10, for liberty to set down the cause on motion for judgment as an action in which the Defendant had "made default in delivering a defence."

The VICE-CHANCELLOR:—I cannot consider the answer as a defence within that rule.

Cozens-Hardy then applied that, notwithstanding the general directions as to pending suits, the suit might be continued under the old practice, so as to enable the bill to be taken as *pro confesso* under Consolidated Order XXII., rule 2; and that, under the circumstances, the actual execution of the attachment might be dis-

pensed with, and the case be considered as coming within the words "or for any other cause" in that rule (1).

The VICE-CHANCELLOR gave leave accordingly.

Solicitors: *White, Renard, & Co.*

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TURQUAND *v.* WILSON.

[1875 T. 84.]

V.-C. H.

1875

Nov. 18.

Practice—Rules of Court, 1875, Order xxxiii. and Order xl., r. 11—Motion for Account.

In a suit to take the accounts of a partnership the Defendants by their answer, filed before the 1st of November, 1875, admitted the partnership, and that they had not accounted; and alleged that the Plaintiff had not accounted, and that moneys were due from him to them. The Plaintiff joined issue, and moved under the new practice, before the hearing, under the Rules of Court, 1875, Order xxxiii., rule 11 (upon affidavit of service), that the accounts of the partnership dealings might be taken:—

Held, that he was entitled to the order under Order xxxiii. or Order xl., rule 11, and order made accordingly.

204 P. 687.

THE bill in this suit was filed in order to obtain an account of the dealings and transactions between the Plaintiff and the Defendants with reference to a joint adventure carried on by them in relation to the purchase, building, and sale of a leasehold messuage, towards which adventure moneys had been advanced by the Plaintiff to the Defendants under agreements entered into between them.

The Defendants by their answer admitted the joint adventure, and the payment of moneys by the Plaintiff to them under it, and

(1) Consolidated Order xxii., rule 2, is as follows: Where any Defendant, whether within or not within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the Plaintiff is unable, with due diligence, to procure a writ of attachment or any subsequent process for want of answer to be exe-

cuted against such Defendant, by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such Defendant shall, for the purpose of enabling the Plaintiff to obtain an order to take the bill *pro confesso*, be deemed to have absconded to avoid or to have refused to obey the process of the Court.

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that they had not accounted. They alleged, however, that the Plaintiff had not accounted to them, and that no money was payable by them to the Plaintiff, but that, on the contrary, moneys were due from the Plaintiff to them.

Upon these pleadings the Plaintiff joined issue.

Dickinson, Q.C., and *Lawson*, for the Plaintiff, now moved, under the Rules of Court, 1875, Order XL., rule 11, for an account of all dealings and transactions of the Plaintiff and Defendants, and of the moneys received and paid by them respectively in respect of the joint adventure. This would enable the Plaintiff, without bringing on the cause on motion for judgment, now to obtain the account which would be directed at the hearing, and a final decree might be made on motion for judgment without bringing the cause on upon further consideration. The Defendants did not appear, and the motion was made on affidavit of service.

HALL, V.C. :—

The case seems to be within either Order XXXIII. or Order XL., rule 11—or within both—and I make the order.

Solicitors: *Redpath & Holdsworth*.

V.-C. H.

1875

Nov. 18.

JACKSON v. MAWBY.

[1875 J. 62.]

Contempt of Defendant—Costs of—Discharge from Custody—Debtors Act, 1869.

Since the *Debtors Act*, 1869, a Defendant who has cleared his contempt by filing his answer cannot be detained in prison for non-payment of the costs of his contempt, but the Court in ordering his discharge will make it part of the order that he do pay the costs of his contempt and of the motion to discharge him.

THE bill in this suit was filed to compel the Defendant *Mawby*, a defaulting trustee, to make good a breach of trust. The Defendant being in contempt for not answering, an attachment was

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issued against him, and he was taken into custody and brought to the Bar of the Court to answer his contempt, when the usual order was made for his transfer from *Oakham Gaol* (where he had been lodged) to *Holloway Prison*, there to remain until he should have cleared his contempt.

The Defendant having filed his answer on the 13th of November, a motion was now made that he might be discharged from prison, and the question was whether he could be so discharged before he had paid the costs of his contempt.

Hanson, for the Defendant *Mawby* :—

The Defendant was committed to prison until he should have cleared his contempt. He has put in his answer and has cleared his contempt, and he is entitled to his discharge, although he may not have paid the costs of his contempt.

Whatever might have been the case before the *Debtors Act*, 1869, since that Act came into operation no person can be detained in prison for non-payment of costs unless his case falls within (and this Defendant's case does not) the exceptions in the 4th section of the Act. That section provides that, with the exceptions therein mentioned, "no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money." And it was decided in *Reg. v. Pratt* (1) that costs are within this enactment; for *Cockburn*, C.J., says in his judgment in that case, "Costs are clearly within the terms of the enactment of the section" (*i.e.* sect. 4), "viz. 'a sum of money'; for otherwise costs of a Defendant on a judgment in his favour in one of the Superior Courts would not be within the enactment." And this is borne out by *Hewitson v. Sherwin* (2), where Vice-Chancellor *James* declined to commit the Defendants for contempt of Court to enforce a money demand, which in that case was a sum of £31 5s. 4d. for taxed costs of exceptions for scandal, holding that he had no jurisdiction in the face of the *Debtors Act*, 1869; although the Vice-Chancellor afterwards held that a sum of money which a man has been ordered to pay by a Court of competent jurisdiction is a "debt" within, and enforceable by committal to prison for six weeks

(1) Law Rep. 5 Q. B. 176, 179.

(2) Law Rep. 10 Eq. 53, 54.

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under, the 5th section of the Act. There is, however, a clear distinction between committing a man to prison upon a substantive application under the 5th section and ordering him to be detained in prison after he has cleared the contempt for which he was committed: *Hall v. Hall* (1).

In *Middleton v. Heaton* (Oct. 15, 1873) the Master of the Rolls ordered the immediate discharge of a Defendant who had cleared his contempt, and reserved the costs of the contempt to the hearing. And the same course was adopted by Vice-Chancellor *Malins* in *Thompson v. Leggatt* (May 22, 1875).

Speed, for the Plaintiff:—

The Defendant has not cleared his contempt until he has not only filed his answer, but has also paid the costs occasioned by his contempt, and ought not to be discharged until he has done so. There are costs which ought to be paid by him personally, whatever the result of the suit may be. To make these costs costs in the cause might have the effect of throwing them on a person who ought not to bear them. It is only in the case of paupers in contempt that the order for discharge is made without payment of costs.

Most of the cases, such as *Roberts v. Albert Bridge Company* (2), *Herrett v. Reynolds* (3), are cases of waiver, but they shew that in the absence of waiver the Defendant must pay the costs of his contempt before his discharge. And though the *Debtors Act* of 1869 may prevent a man from being arrested for non-payment of costs, it does not alter the terms on which his contempt is to be cleared, or prevent him from being detained in prison when there until he has paid the costs of his contempt.

HALL, V.C.:—

The question is, whether this Defendant has cleared his contempt without paying the costs of it. Before the *Debtors Act*, 1869, he could have been detained in prison until he had paid these costs. The effect of that statute is to take away from the Court the power of keeping him in prison because he has not paid

(1) Law Rep. 11 Eq. 290.

(2) Law Rep. 8 Ch. 753.

(3) 2 Giff. 409.

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them, and I shall grant the order for his discharge, but I shall make it part of my order that he do pay the costs of his contempt and of this application, leaving the Plaintiff to enforce such payment as he may be advised.

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Solicitors: *Paterson, Snow, & Burney*, agents for *Hough & English, Oakham*; *Taylor, Hoare, Taylor, & Cooke*, agents for *Griffiths & Co., Birmingham*.

ATTORNEY-GENERAL v. WILLSHIRE.

V.-C. H.

[1875 A. 79.]

1875

Practice—Judicature Act, 1873, s. 22—Pending Suit—Further Proceedings.

Nov. 18.

In suits pending on the 1st of November, 1875, in which notice of motion has not been given under the old practice, the Plaintiff must, at the time when he would have given such notice, join issue under the new practice, without filing affidavits in support of his case, unless by consent or special leave obtained on notice for the purpose.

THIS suit was a pending suit which had proceeded as far as the filing of the answer before the 1st of November, 1875.

Chubb, for the Informant, applied under sect. 22 of the *Judicature Act, 1873*, for the direction of the Court whether, having regard to the general direction issued on the 3rd of November with reference to pending suits in which notice of motion for decree would have been given under the old practice, the proceedings under the old practice should terminate before or after the filing of the Plaintiff's or Informant's affidavits.

HALL, V.C. :—

The intention of the general direction as to pending causes was, that, in all those cases, at the time when notice of motion would have been given under the old practice, issue must be joined under the new practice, without first filing affidavits, unless by consent or special leave obtained on notice.

Solicitors: *Deane, Chubb, & Co.*

W L L (1875) 054. 468

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HOOPER *v.* SMART.

[1873 H. 147.]

PIPER *v.* PIPER.

[1863 P. 163.]

BAILEY *v.* PIPER.

[1873 B. 20.]

Will—Administration Suit—Payment of Debts—Following Assets—Fund in Court—Assignments for Value—Prior Right of Creditor.

In an administration suit all the certified debts were paid, and the residuary legatees were declared entitled to the estate of the testator subject to an annuity, to provide for which a fund was retained in Court to the credit of the cause.

The fund in Court was assigned for value by the residuary legatees, and stop orders were obtained. Afterwards other creditors of the testator established their claim in another suit, to which the executor of the testator and the residuary legatees were parties:—

Held, that these creditors were entitled to payment out of the fund in Court in priority to the assignees of the residuary legatees.

THE survivor of three trustees under the will of *John Monkhouse*, who died in September, 1818, devised to his nephew, *Robert Monkhouse Piper*, who was under such will interested in the estates, all such real estates as were vested in him upon any trusts, to hold the same upon the trusts affecting the same.

Robert Monkhouse Piper, who died in 1863, soon after making his will in October of that year, after appointing his wife, *Mary C. L. Piper*, and two other persons executors and trustees thereof, devised and bequeathed to them all his freehold, and leasehold, and the residue of his personal estates upon trust to pay to his wife thereout the yearly sum of £500 for life, and to invest the residue of the rents or profits as therein mentioned for the benefit of his two sons, *Robert Frederick* and *Charles Augustus Piper*, and after his sons attained the age of twenty-five, the testator devised and bequeathed his said estates to the use of his two sons for their own benefit as tenants in common. The will was proved by the widow alone.

In December, 1863, the suit of *Piper v. Piper*, in which the two sons were Plaintiffs and their mother, *M. C. L. Piper*, Defendant, was instituted for the administration of the testator's real and personal estates, and by the decree made in January, 1864, it was ordered that a receiver should be appointed to receive the rents and profits of the estates, and to collect and get in the outstanding personal estate, with a direction for the payment of the balances into Court, to the credit of the cause and for investment thereof, and of the interest to accrue on such investments.

On the marriage, on the 10th of November, 1864, of *Mary C. L. Piper* with *G. H. Brand*, the above-mentioned annuity of £500 was assigned to trustees in trust for *G. H. Brand*, for life, and if she should survive him, then in trust for her or her assigns.

By the certificate made in February, 1865, the Chief Clerk, after certifying the amounts of the debts of the testator (very small), certified that the testator's estates consisted of a sum of £15,319 8s. 10d. £3 per Cent. Annuities, and £224 0s. 11d. cash standing to the credit of the cause, and of certain specified freeholds, and leaseholds, and mortgages.

On the 15th of June, 1865, on the further consideration of *Piper v. Piper*, it was declared that, subject to the said annuity of £500, the Plaintiffs, *R. F.* and *C. A. Piper*, were entitled under the same will (*R. M. Piper's*) to such freehold estates in equal shares as tenants in common, and to such leasehold and residuary personal estates in equal shares absolutely; and after directing payment of the testator's debts out of the fund in Court, it was ordered that out of any cash arising from dividends on that fund the annuity of £500 should be paid half yearly, and if the same should be deficient for that purpose the deficiency should be paid by the receiver out of any cash balances arising from the rents and profits of the freehold and leasehold estates and mortgages, and the receiver, after providing, as directed, for the maintenance of the Plaintiffs, was ordered to pay the balance into Court to be invested.

In June, 1865, a sum of £836 for damages to land devised by *R. M. Piper*, by a railway company, was paid to "the account of the estates" so devised, and was invested, and it was ordered that the interest on that investment should be paid to the receiver.

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In August, 1869, Mrs. *Brand* was, by inquisition, found to be a person of unsound mind and a committee was appointed of her estate.

The balances of the receiver were paid into Court and invested in £3 per Cent. Annuities, and by means of such investments those annuities, forming part of *R. M. Piper's* residuary personal estate, were increased to the sum of £17,328 11s. 1d.

By an order made in July, 1871, on the application of the Plaintiffs in *Piper v. Piper*, it was ordered that the receiver should, after the passing of his final account, pay to each of such Plaintiffs a moiety of the balance which should be certified to be due on such account. That order was carried out in April, 1872, and the said Plaintiffs obtained possession of all the real and personal estates of *R. M. Piper*, with the exception of the £17,328 11s. 1d. annuities in Court.

That sum was still standing to the credit of *Piper v. Piper*, and the dividends had been applied in payment of the above-mentioned annuity of £500.

Early in the year 1873, *R. F.* and *C. A. Piper* were adjudicated bankrupts and trustees in bankruptcy of their estates were appointed.

On the 10th of June, 1873, a suit (*Hooper v. Smart* (1)) was instituted by *Martha Hooper* and her husband, against *R. F.* and *C. A. Piper* and the *Brands* (afterwards amended by making the Messrs. *Pipers'* trustees parties), claiming in effect a moiety of the property which had been devised and bequeathed to *R. M. Piper* upon the trusts affecting the same.

It appeared that *John Monkhouse*, who died in 1818, by will, in 1809, devised and bequeathed his property upon trust for his daughter *Ann Lydia* (who died in 1856), and her husband, *Robert Piper* (who died in 1839), for life, with remainder for their children equally. They had two children, *Robert Monkhouse Piper* and *Jane Mary*, who married *J. F. Monkhouse* and died in 1831 intestate, leaving *John Robert Monkhouse* her eldest son and heir-at-law. He married *Martha Williams*, and died in 1853. By his will he gave all his property to his wife. She married, in 1856, *W. H. Hooper*. There was no settlement on the marriage.

(1) Law Rep. 18 Eq. 683.

On the death of his mother, *Ann Lydia Piper*, in 1856, *Robert Monkhouse Piper* entered into possession of the entirety of the estates devised and bequeathed by *John Monkhouse*, and which were situate at *Shepherd's Bush* and in *Pall Mall*; occupied a part; received the rents and profits of other parts; and had appropriated the same to his own use without accounting for any part to *Martha Hooper* and her husband.

On the hearing of *Hooper v. Smart*, on the 6th day of July, 1874, it was declared that on the death of *Ann Lydia Piper*, on the 2nd of April, 1856, *Martha Hooper* became equitably entitled to one undivided moiety of the hereditaments at *Shepherd's Bush* and in *Pall Mall* devised by the will of *John Monkhouse*, and that the *Brands* were trustees of such moiety (in effect) for her and her husband; liberty was given to the *Hoopers* to apply in Chambers in reference to a conveyance of such moiety or for an order vesting the same, and also as to the rents and profits, and it was declared that the estate of *R. M. Piper* was liable to account to the *Hoopers* for one moiety of the rents and profits of such hereditaments received by him from the 2nd of April, 1856, to the 24th of October, 1863 (the date of his death), including a moiety of an occupation rent for the part of the property which he occupied, and that his estate was also liable to pay the costs of the suit.

Accounts of such rents and profits were directed, and it was declared that the amount which should be found due and the costs should be a charge on the moiety of the hereditaments of *R. M. Piper*; that the *Hoopers* were entitled to be paid such amount out of such moiety or the proceeds of the sale thereof, but without prejudice to their right to resort for payment to any other remaining assets of *R. M. Piper*. An inquiry was directed whether any part of the £17,328 11s. 1d annuities in Court represented rents and profits of the *Hoopers'* moiety of the hereditaments accrued due since the 24th of October, 1863, and it was declared that they were entitled to any such part, if there was any, but without prejudice to the right of the *Brands* to have such fund recouped out of any remaining real estate of *R. M. Piper* or the proceeds of sale thereof.

On the 1st of July, 1875, the Chief Clerk certified that the

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sum of £1462 2s. 2d. rents, &c., received remained due to the *Hoopers* from *R. M. Piper's* estate. He also certified that the *Hoopers'* costs of suit amounted to £304 1s. 1d., and the *Brands'* costs to £97 0s. 6d, and £127 0s. 5d. He also certified that the sum of £738 12s. 6d. annuities, part of the £17,328 11s. 1d. annuities in Court, represented rents and profits of the *Hoopers'* moiety of the hereditaments accrued since the 24th of October, 1863.

By the decree made in July, 1874, the *Hoopers* were granted relief against the estate of *R. F. and C. A. Piper*, but at their (the *Hoopers*) request an inquiry or account as against that estate had not been made or taken.

The facts stated in the suit of *Bailey v. Piper* were set forth in the petition, and the parties thereto were made respondents. It appeared that *R. F. and C. A. Piper* agreed to sell to *Bailey* the entirety of the estate at *Shepherd's Bush*, and that the Court held, in effect, that they were at the date of their agreement only entitled to a moiety of such estate (1).

The Plaintiff *Bailey* was allowed to deduct his costs from the amount of the purchase-money remaining unpaid in respect of the *Pipers'* moiety, and he was ordered to pay the balance of such purchase-money into Court to the credit of the cause *Bailey v. Piper*, and it was also ordered that such sum should not be paid out without notice to the *Hoopers* and the *Brands*. The balance paid into Court by *Bailey* was invested in the purchase of £545 8s. 4d. consols, which were still standing to the credit of his cause.

In February, 1874, the *British Mutual Investment Company, Limited*, instituted a suit against *Smart* and another (the trustees in bankruptcy of the *Pipers*), the *Brands*, and the *Hoopers*, stating that on the 30th of August, 1872, the company advanced to the *Pipers* the sum of £5000 upon the security of a memorandum of charge signed by them upon the property in *Pall Mall*—part of the property subject to the decree in *Hooper v. Smart*—accompanied by a deposit of the title-deeds relating thereto; admitting that the *Hoopers* were entitled to a moiety of the property; but claiming priority in respect of the company's charge upon the moiety of *R. M. Piper* over the charge thereon given to the *Hoopers*

by the decree in *Hooper v. Smart*, and seeking the usual foreclosure decree against all the Defendants in the suit.

The *Hoopers* demurred to the bill, and on the 5th of July, 1875, the demurrer was, on appeal, overruled with costs.

The value of the moiety of the property in *Pall Mall* was insufficient to pay to the company the amount advanced by them on their security, the *Hoopers*, considering it useless to contest any further the title of the company, had agreed to submit to a decree of foreclosure as against themselves. It was alleged that the moiety of the hereditaments of *R. M. Piper* had been disposed of to purchasers for value who had priority over the *Hoopers* as creditors of *R. M. Piper*, that the charge thereon given to the *Hoopers* by the decree in *Hooper v. Smart* was applicable only to the sum of £545 8s. 4d.; that the only remaining assets was the £17,328 11s. 1d. annuities, after deducting therefrom the said sum, £738 12s. 6d. annuities; that the *Equitable Reversionary Interest Society* and *H. J. Whitlock* claimed to be incumbrancers on, or absolute purchasers for value of, the reversionary interest of *R. F. and C. A. Piper* in the £17,328 11s. 1d. annuities, and that on the 20th of June, 1871, and the 13th of April, 1872, the society, and on the 10th of January and the 27th of February, 1873, *Whitlock*, obtained orders that no part of the same should be paid out of Court without notice to them and him.

This was a Petition by the *Hoopers*, praying that under the circumstances the £545 8s. 4d. annuities might be sold, and the proceeds of sale paid to them in satisfaction, so far as it would extend, of the said sum of £1462 2s. 2d.; that the said sum, £738 12s. 6d. annuities, part of the £17,328 11s. 1d. annuities, might be transferred to them; and that of the residue of the latter sum, so much as would at the date of the transfer be sufficient to raise the unpaid balance of the £1462 2s. 2d., and the costs before mentioned (together £528 2s.), might be sold, and that out of the proceeds of sale the said balance and costs might be paid; and that the Petitioners' costs of this Petition might also be paid out of the fund in Court.

Bagshawe, Q.C., and *Wiglesworth*, for the Petitioners:—

The fund in Court is incontestably personal estate of *Robert*

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Monkhouse Piper, the debtor. In a suit in which his personal representative was a party the Petitioners established their debt, and having done that, they are entitled to follow the testator's estates, no matter in whose hands they find them. But there being a fund in Court which has not been paid over to any person, the Petitioners ask to be paid their debt out of it, and it is submitted that they ought not to be deprived of their right so to be paid. If the fund had remained in the hands of the original trustees, a purchaser of the reversion could have had no better right than the assignor. This is a *chose in action*, and it makes no difference whether it be in Court or not. The purchasers of the reversion must have known that creditors might come in and establish claims. No doubt a distinction has been made in the case where the assets had been paid over, and they were actually in the hands of the purchaser; but here a fund remains available and the purchasers have no right to prevent payment of the Petitioners' debt.

[They referred to and distinguished the cases of *Noble v. Brett* (1); *Dilkes v. Broadmead* (2); and *Ridgway v. Newstead* (3).]

Westlake, Q.C., and *B. B. Rogers*, for the Respondents, the *Equitable Reversionary Interest Society*, contended that the Petitioners were not entitled to be paid out of the fund in Court; but even if they were, that they ought not to have precedence in payment of the debt over the society (which was in the position of a purchaser for value without notice), and certainly not for costs. In the suit of *Piper v. Piper* it was in effect certified that there were no debts. It made no difference because there had been no actual transfer to the society. If the Petitioners were entitled to be paid, there ought to be apportionment over the whole property. This case was much stronger in the society's favour than was *Dilkes v. Broadmead* (4).

[They also referred to *Gillespie v. Alexander* (5); *British Mutual Investment Company v. Smart* (6); *Seton on Decrees* (7); *Thorn-*

- (1) 24 Beav. 499. 4 Jan 45. 623. (4) 2 D. F. & J. 574. 6 Jan 45. 528.
 (2) 2 D. F. & J. 566. 6 Jan 45. 289. (5) 3 Russ. 130.
 (3) 3 Ibid. 474. 7 Jan 45. 451. (6) Law Rep. 10 Ch. 567.
 (7) Page 139.

(2) & (4) SC 7 Jan 45. 56

dike v. Hunt (1); *Case v. James* (2); *Greig v. Somerville* (3); *Davies v. Nicolson* (4); and *Hooper v. Smart* (5).

Warmington, for the Respondent *H. J. Whitlock*, also contended that the Petitioners were not entitled to precedence over the assignees of the reversion, for value, without notice, with stop orders upon the fund, who had, therefore, done all that the law required them to do to obtain full security upon the fund.

Bristowe, Q.C., and *Lemon*, for Mrs. *Brand* and her committee, and *A. Bailey*, for Mr. *Brand*, referred to *Todd v. Studholme* (6), and *Gillespie v. Alexander* (7), and submitted that the debt ought to be paid out of all the property *pro rata*, and not paid entirely out of the fund which had been set apart to answer the annuity. Also that should the annuity be diminished, the annuitants would be entitled to be paid out of the rents and profits of the testator's realty, wherever it might be found, as it was the duty of the purchasers to see that the annuity was fully provided for.

Dickinson, Q.C., and *Horton Smith*, for the Respondent *Bailey*, referred to *Bailey v. Piper* (8), and asked for his costs.

Hastings, Q.C., and *Phear*, appeared for the *British Mutual Investment Company, Limited*, who had not been served with the Petition, and were held not entitled to be heard.

Bagshawe, in reply.

HALL, V.C.:—

I am of opinion that the view contended for by Mr. *Bagshawe* is correct. The rights of his clients having been declared and ascertained in a suit properly constituted against those persons who alleged that they were interested in the real and personal estate in question, I consider that those who derive title under

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- (1) 3 De G. & J. 563. (5) Law Rep. 18 Eq. 683.
 (2) 3 D. F. & J. 256. (6) 3 K. & J. 324.
 (3) 1 Russ. & My. 336. (7) 3 Russ. 130.
 (4) 2 De G. & J. 693-702. (8) Law Rep. 18 Eq. 683.

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the residuary legatees, parties to that suit, cannot now complain of the decree made therein, and that their rights must be subject to the rights declared in that suit. The principal question which has been argued was as to the residuary legatees having made alienations of their shares of the residue; but taking it to be in their favour that any such alienations specially dealt with a particular fund which had been set aside by the Court as residue in the administration suit of *Piper v. Piper*, that does not vary the case, either as to such fund being bound by what has taken place, or as regards the Petitioners' rights under the circumstances. The persons taking for value, as purchasers, under residuary legatees must be held to take the interests so acquired by purchase subject to the rights and interests of those creditors who may come in according to the general rule of the Court and establish the right to payment of their debts, so long as any fund remains available for that purpose. The fact of there having been a certificate by the Chief Clerk that there were no debts of the testator payable or to be paid in the suit of *Piper v. Piper* does not deprive creditors who were entitled to come to the Court of their rights, nor are they deprived of them by the residuary legatees having sold or disposed of their interests in the residue, or in part of it. This fund remains in Court, and the purchasers took subject to the risk that other claims might be brought in and established. They took only as purchasers and transferees of *choses in action*, and such purchasers and transferees are always exposed to great risk. They have been held to take subject to making good a breach of trust by a trustee, the vendor, although the breach of trust was subsequent to the purchase. So long as a fund remains in Court, it is available for payment of the creditors' debt, and that being so, the contention in this case on behalf of the purchasers fails.

Then as to the argument in reference to apportioning the payment of the debt between such part of the residuary estate as remains available and such part as has been paid out of Court or transferred to the residuary legatees, I do not know of any authority in support of it. This is not the case of two legatees, one of whom has received his share and the other has not. Such a case as that has no application to this one. I think that the Peti-

tioners' case has been made out, and that they are entitled to all that they have contended for; and therefore there must be a declaration according to the prayer of their Petition. The costs of Mr. *Dickinson's* client, who was a necessary party, must be paid by the Petitioners, and they must add them to their own costs and be paid out of the fund. Referring to what took place in the suit of *Piper v. Piper*, I do not think that any persons claiming as purchasers under the residuary legatees could have set up the *Statute of Limitations* now, having regard to the declarations in that suit.

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Solicitors: *Ridsdale, Craddock, & Ridsdale; F. W. Denny; Clayton & Sons; Yarde & Loader; Aldridge & Thorn; Bailey, Shaw, Smith, & Bailey; Ravenscroft, Hills, & Woodward; Barnards & Co.*

WHETSTONE v. DEWIS.

[1875 W. 38a.]

V.-C. H.

1875

Nov. 24.

Practice—Rules of Court, 1875, Order xvii., r. 2—Cause of Action—Action for the Recovery of Land—Joinder with other Action.

An action "to establish title to land" is an action "for the recovery of land" so as to require the leave of the Court under the Rules of Court, Order xvii., rule 2, for its joinder with another cause of action.

An action for the administration of personal estate may be joined with an action to establish title to real estate where the Plaintiff claims both estates under a common gift in the same will.

THIS was an application under the Rules of Court, Order xvii., rule 2, for the leave of the Court to join an action to administer the personal estate of a testator with an action to establish title to part of his real estate. The questions to be determined in the action arose with regard to the construction of gifts over in a will which included together real and personal estate.

The lands were in the occupation of tenants whom it was not desired to disturb, and the Plaintiff indorsed her writ with a claim to establish title to the land instead of a claim for the recovery of possession thereof, and desired to join therewith a claim for administration.

V.-C. H. *Carson*, for the Plaintiff, in support of the application :—

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To determine the construction of the gifts in the testator's will finally it would have been necessary, under the old practice, to administer the personal estate in Chancery, and also to bring ejectment at common law. The Plaintiff now sought, under the new practice, to combine both these proceedings in one action ; but the new Rules of Court, Order XVII., rule 2, provided that, with the exceptions therein specified, no cause of action should, unless by leave of the Court, be joined with an action for recovery of land. He submitted that an action to establish title to land was an action for the recovery of land within the meaning of the rule, although separate forms of indorsements were given for those actions in the *Judicature Act*, 1875, Appendix A., Part II., s. 4. The Plaintiff had accordingly indorsed her writ with a claim for administration, and also with a claim to establish her title to the land, and he therefore now applied for leave to join these causes of action.

HALL, V.C. :—

I think that an action to establish title to land is an action for the recovery of land so as to require the leave of the Court under the Rules of Court, 1875, Order XVII., rule 2, for its joinder with another cause of action. As the gifts in the will are made together, though the construction may be different as to the realty and personalty, I think the proposed course the proper one, and I shall give leave accordingly.

Solicitors: *Duncan, Murton, Warren, & Gardner.*

Ex parte GIBBES. *In re* WHITWORTH.

C. J. B.

1875

Nov. 8.

Vendor and Purchaser—Unpaid Vendor—Stoppage in transitu—End of transitu—Destination prescribed by Vendor—Constructive Possession of Purchaser—Goods on Siding at Railway Station appropriated to Purchaser—Part delivery of Goods.

Cotton was shipped at *Charleston*, in *America*, for carriage to *Liverpool*. The purchaser resided at *Luddenden Foot*, in *Yorkshire*. The cotton was consigned to the vendor's agent at *Liverpool*, to whom the bills of lading were also sent by the vendor, together with a bill of exchange for the price of the cotton, drawn by the vendor on the purchaser.

On the arrival of the cotton at *Liverpool*, the bill of exchange was sent by the vendor's agent to the purchaser, and upon its return accepted by him the bill of lading was sent to him. He then indorsed the bill of lading and sent it to the manager of a railway company in *Liverpool*, who paid the sea freight and obtained possession of the cotton, which was then forwarded by the railway to *Luddenden Foot Station*. The invoice of the cotton which was sent to the purchaser described it as shipped by the vendor to *Liverpool*, consigned to order, for account and risk of the purchaser, *Luddenden Foot*. The bill of lading provided for the shipment of the cotton into the port of *Liverpool*, there to be delivered to order or assigns, he or they paying freight immediately on landing the goods:—

Held, that the *transitus* prescribed by the vendor ended at *Liverpool*, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had no right to stop it *in transitu*.

THIS was an appeal from a decision of the Judge of the *Halifax* County Court.

William Whitworth was a cottonspinner carrying on business as *R. Whitworth & Co.* at *Boy Mill, Luddenden Foot*, near *Halifax*. He filed a liquidation petition on the 17th of April, 1874, under which a trustee was appointed on the 8th of May. At the time when the petition was filed there were at the *Luddenden Foot Station* of the *Lancashire and Yorkshire Railway Company* seventy-eight bales of cotton consigned to *Whitworth*, which had not been paid for, and as to which the question arose whether the vendors had any right to stop them *in transitu*.

R. Whitworth & Co. were in the habit of purchasing cotton from *Gibbes & Co.*, of *Charleston*, in *America*. The course of trading was this: *Gibbes & Co.*, consigned the cotton, which was purchased from them by *Whitworth & Co.*, to their agents, *Brown, Shipley, &*

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Co., of *Liverpool*, to whom they also forwarded the bill of lading of the cotton, together with a bill of exchange for the price drawn upon *Whitworth & Co.* On receipt of the draft, *Brown & Co.*, sent it to *Whitworth & Co.* for acceptance, and, upon its being returned accepted by them, *Brown & Co.* transmitted the bill of lading to *Whitworth & Co.*, and they, having indorsed the bill of lading, sent it to Mr. *Windle*, the manager of the *Lancashire and Yorkshire Railway Company*, at the *North Docks Station, Liverpool*, where the cotton lay. The railway company then paid the sea freight of the cotton, either by means of remittances sent to them for the purpose by *Whitworth & Co.*, or by advances which they made for the purpose on account of *Whitworth & Co.*, and obtained possession of the cotton, which they then forwarded by their own line of railway to *Luddenden Foot Station*. The company did not deliver goods from that station, but their ordinary practice was, on the arrival of goods, to send an advice note to the consignee, requiring him to remove the goods within forty-eight hours; and in case he did not do so, he was charged demurrage for the goods at the rate of 3s., per truck *per diem*. This, however, was not the practice in the case of *Whitworth & Co.* Their mill immediately adjoined the *Luddenden Foot Station*, and there was a siding there, known as the "*Whitworth's siding*," for their exclusive use. When trucks consigned to them arrived, no advice notes were sent to them, as from the position of their mill they would be aware of the arrival. They had a ledger account with the company for freight.

The *Whitworth's siding* was on the south side of the main line of the railway, *Boy Mill* being on the north side of it. The siding was connected with the main line by points, and with the interior of the mill by means of a turn-table and a level crossing. The siding was constructed on land belonging to the railway company, but it was constructed by the company, and kept in repair by them at the expense of *Whitworth & Co.* It was closed by means of blocks, which were fastened by padlocks, except at the time when trucks were being moved into or removed from the siding, and trucks could not be removed from it into the mill except with the permission and under the control of the company's officers. But *Whitworth & Co.*, subject to that permission

and control, could always, after the arrival of goods consigned to them, remove them as and when they pleased into their mill. A notice-board was erected by the company on the siding, bearing in large letters the words "*Whitworth's Siding.*" Trucks consigned to *Whitworth & Co.* were generally, on their arrival, placed by the company's servants on the *Whitworth's* siding, but sometimes they were left standing in the station-yard or in the general siding.

The seventy-eight bales now in question were part of 144 bales purchased by *Whitworth & Co.* from *Gibbes & Co.* These 144 bales were shipped from *Charleston* to *New York* in two lots of seventy-two bales each, and thence re-shipped to *Liverpool*. Seventy-two bales arrived at *Liverpool* in a ship called the *Republic*, and the other seventy-two arrived there in a ship called the *Celtic*. The invoice of the seventy-two bales *ex Republic* was headed thus: "Invoice of seventy-two bales uplands cotton shipped by *Gibbes & Co.* in good order, *per S. S. Georgia, Tabor*, master, bound for *New York*, from thence to be re-shipped by steamer to *Liverpool*, consigned to order, for account and risk of *R. Whitworth & Co., Luddenden Foot.*" Then followed a description of the bales, and an account of the charges, which amounted to £1047 19s. The invoice was received by *Whitworth & Co.* on the 6th of April, 1874, and on the same day they accepted a bill of exchange for £1047 19s. which had been drawn on them by *Gibbes & Co.* and had been sent with the bill of lading to *Brown & Co.* On the return of the bill of exchange accepted to *Brown & Co.*, they forwarded the bill of lading of the seventy-two bales to *Whitworth & Co.* The bill of lading was headed thus:—

"*Charleston to Liverpool.*

" <i>New York and South Carolina</i>	}	<i>White Star Line.</i>
<i>Steamship Company.</i>		
<i>Charleston to New York.</i>		
<i>Wagner, Huger, & Co.,</i>		
<i>Wm. A. Courtenay,</i>		
	Agents.	<i>J. H. Sparks, Agent.</i>

"Messrs. *Wagner, Huger, & Co.* and Mr. *William A. Courtenay* are authorized to issue through bills of lading from *Charleston* to *Liverpool* for merchandise shipped by the steamers of the *New York and South Carolina Steamship Company* to *New York* to the

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C. J. B. consignment of the *White Star Line, Limited*, for re-shipment to
1875 *Liverpool* by steamer or steamers of their own, or other first-class
line."

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Then followed a description of the seventy-two bales by marks and weight, and the bill of lading went on to provide that the goods were to be carried into the port of *New York*, to be there delivered to the *White Star Line, Limited*, for transportation by the said company by their own or other first-class steamers from *New York* into the port of *Liverpool*, and there to be delivered unto order or its assigns, he or they paying freight immediately on landing the goods. The bill bore date at *Charleston* the 19th of March, 1874. It was received by *Whitworth & Co.* on the 8th of April, 1874, and the same day they indorsed it and forwarded it to *Windle* at *Liverpool*. He advanced the money to pay the sea freight, and the bales were then given up to him, and were forwarded by the railway to *Whitworth & Co.* at *Luddenden Foot*, where they all arrived on or before the 15th of April. Thirty-three of them were at once taken by *Whitworth & Co.* into their mill for use. Of the remaining thirty-nine, twenty bales in truck No. 3166 arrived at *Luddenden Foot Station* on the 14th of April, and nineteen bales in truck No. 1260 arrived there on the 15th of April. The truck No. 3166 containing the twenty bales was on its arrival placed by the servants of the company in the *Whitworth's* siding, where it remained until the 18th of April, when, without any communication with *Whitworth & Co.*, it was removed by the company's servants and placed in the company's general siding. This was done in order to assert a lien which the company claimed for unpaid freight due to them by *Whitworth & Co.*, the company having received information of the filing of the liquidation petition on the 17th of April. The truck No. 1260 with the nineteen bales remained after its arrival in the company's station yard. In neither case was any advice note given by the company to *Whitworth & Co.*

In the case of the seventy-two bales which arrived at *Liverpool* in the ship *Celtic*, the invoice and the bill of lading were respectively in similar terms to those which were given in the case of the shipment by the *Republic*. The invoice for the seventy-two bales *ex Celtic* was received by *Whitworth & Co.* on

the 13th of April, and the same day they accepted a bill of exchange for £1079 16s. 9d. drawn on them by *Gibbes & Co.* The bill of lading was then sent to them, indorsed by them, and transmitted to *Windle*, who advanced money to pay the sea freight. The seventy-two bales were then given up to the railway company, and forwarded by them to *Whitworth & Co.* at *Luddenden Foot Station*. All these seventy-two bales arrived there on or before the 21st of April, and thirty-three of them were at once taken into the mill for use. Of the remaining thirty-nine bales, twenty-six bales, in truck No. 11693, arrived at *Luddenden Foot Station* on the 19th of April, and thirteen, in truck No. 7524, arrived on the 21st of April, where they remained in the station yard or in the general siding of the company. They were not placed in the *Whitworth's* siding.

The company claimed a lien for freight on all four trucks, and on the 22nd of April they delivered to the receiver under the petition an advice note for the whole seventy-eight bales. The freight due was afterwards paid by the trustee to the company.

On the 22nd of April the agent of *Gibbes & Co.* at *Liverpool* gave notice to the station-master at *Luddenden Foot*, stating that *Gibbes & Co.* were the owners of the seventy-eight bales, and cautioning him from delivering them to *Whitworth & Co.*, they not being their property. At this time the two bills of exchange had not matured.

The cotton was afterwards sold by arrangement between the trustee and *Gibbes & Co.*, and application was made to the County Court to decide who was entitled to the money arising from the sale. The Judge held that as to the thirty-nine bales *ex Republic*, the transit was at an end before the notice was given by *Gibbes & Co.* to the railway company, and that consequently the trustee was entitled to these thirty-nine bales. But as to the thirty-nine bales *ex Celtic*, His Honour held that *Gibbes & Co.* were entitled to them. The ground of the distinction was this, that in His Honour's view the act of the railway company in removing the truck No. 3166 on the 18th of April from the *Whitworth's* siding to the general siding amounted to a determination of the previously subsisting arrangement between the company and *Whitworth & Co.*, by virtue of which the latter were at liberty to take possession of goods consigned to

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them immediately on their arrival, without any permission of the company, and without paying the company's charges for freight. Consequently the thirty-nine bales *ex Celtic*, which arrived at *Luddenden Foot Station* after the 18th of April, were not constructively in the possession of *Whitworth & Co.*, but remained in the company's possession as carriers until their charges were paid, which was not done till after the notice had been given by *Gibbes & Co.* not to deliver the goods to *Whitworth & Co.*

The trustee appealed from the decision, and *Gibbes & Co.* presented a cross appeal.

Benjamin, Q.C., and *Jordan*, for the trustee:—

We contend that as between *Gibbes & Co.* and *Whitworth* the *transitus* of the goods was at an end before any attempt was made to stop them *in transitu*. The *transitus* was at an end at *Liverpool*. The test is this: Have the goods reached the place where they were to be conveyed by the carriers, and where they will remain unless the purchaser gives some fresh order for their subsequent disposition? *Wentworth v. Outhwaite* (1). In this case, when the cotton had arrived at *Liverpool*, and *Whitworth* had accepted the bills of exchange, and the bills of lading had been sent to him, it was subject to his order. The property had then passed to *Whitworth*, and the cotton was in his possession by means of the railway company, who were his agents, before the petition was filed. In *Coventry v. Gladstone* (2), Lord *Hatherley* (when Vice-Chancellor) said: "The question is, not whether the voyage is at end, but whether the goods are at home, actually or constructively in the possession of the vendee."

At any rate, looking at the course of dealing between *Whitworth* and the railway company, the cotton was all constructively (if not actually) in his possession before the petition was filed, and nothing which the company did after the petition was filed could alter his rights. Their lien for freight does not affect the question: *Allan v. Gripper* (3). Moreover, as part of the entire cargo of each ship was delivered to *Whitworth*, and actually consumed by him, that amounted to a constructive delivery of the

(1) 10 M. & W. 436, 450. (2) Law Rep. 6 Eq. 44.

(3) 2 Cr. & J. 218.

whole cargo: *Crawshay v. Eades* (1). The only exception to the rule that delivery of part is a constructive delivery of the whole, is where it appears that the partial delivery was not intended to operate as a delivery of the whole: *Bolton v. Lancashire and Yorkshire Railway Company* (2).

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De Gex, Q.C., and *Finlay Knight*, for *Gibbes & Co.*:—

We say that when we gave the notice we had a right to stop the whole seventy-eight bales. But, at any rate, the order of the County Court Judge is right as far as it goes. *Brown & Co.* were in truth the consignees at *Liverpool*, they were our agents, and the *transitus* as between vendor and purchaser did not begin until the goods left their control. The goods were not in the possession of any one on behalf of the purchaser until they were delivered to the railway company at *Liverpool*. The company only took possession of them in the character of common carriers, and the fact that the carrier is selected by the purchaser makes no difference in the vendor's right to stop *in transitu*. The vendors never parted with the control of the goods until they were placed in the hands of a public carrier for transmission to the purchaser, and they, therefore, had a right to stop them *in transitu* at any time before there was an actual or a constructive delivery to the purchaser at *Luddenden Foot*: *Whitehead v. Anderson* (3). The *transitus* was not over until the goods were actually taken into *Whitworth's* mill. The *Whitworth's* siding was only set apart for *Whitworth's* use for the mutual convenience of him and the company; it was not his property. In order to change the character of the railway company from that of carriers into that of warehousemen, it must be shewn that there was some positive contract to that effect between them and *Whitworth*: *Whitehead v. Anderson*. Nothing of the kind is shewn, and, in fact, the goods had not left the company's own trucks. The lien of the company for freight is a material point in the case, inasmuch as their acts shew that they considered they had a right to place the goods anywhere they pleased on their own line. The doctrine of part

(1) 1 B. & C. 181, 185.

(2) Law Rep. 1 C. P. 431.

(3) 9 M. & W. 518.

C. J. B. delivery does not apply, for the contents of each truck must be treated as a separate parcel.

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[They referred also to *Berndtson v. Strang* (1); *Tucker v. Humphrey* (2).]

BACON, C.J. :—

In my opinion the case is reasonably clear.

The question is one of most ordinary occurrence. The merchants, the owners of cotton at *Charleston*, agree to send shipments to *Liverpool*, and no where else. They send them from *Charleston* by two vessels for transshipment at *New York*, and they are to be paid for by acceptances of *Whitworth*. The vendors send the bills of exchange to *Brown, Shipley, & Co.*, in order that they may present those bills for acceptance to *Whitworth*. They accompany the bills with the shipping documents, and upon the acceptance of the bills the shipping documents are given up to the purchaser's agent. The title to the delivery and possession of the goods is transferred by means of the bills of lading. The destination of the goods was *Liverpool*. If anything had happened to the purchaser during the voyage there, the vendors would have had a right to stop the goods. At the place which the vendors prescribe as the destination of the goods the goods arrive; the *transitus* is then ended. The vendee, the person on whose risk and account the goods were to be so shipped, had no right to claim the goods unless he was, as he became by the act of the authorized agent of the vendors, the absolute owner of the goods. The goods were paid for by means of bills, which I am quite aware are not good bills by reason of the subsequent failure of the purchaser, but they were paid for in the manner stipulated, and when the goods arrived at *Liverpool* the purchaser acquired a right, by the fact of his having accepted the bills and performed the condition, to demand from the ship's master the delivery to him of the goods. He exercised that right, and the argument has been that there remained a *transitus* after that. How is it possible to say there could be any *transitus* after that? If the point of destination had not been reached, then what Mr.

(1) Law Rep. 4 Eq. 481.

(2) 4 Bing. 516.

De Gez has said to me might have applied. But that is not the present case at all. When *Windle*, the agent for *Whitworth*, paid the sea charges, which he did on *Whitworth's* account, he became the holder of the bills of lading for *Whitworth*, and the goods were delivered to him in that character, and there was an end of the *transitus* prescribed by the vendor. The *transitus* which took place after that was only prescribed by the purchaser; the vendor had nothing to do with it. The vendor's *transitus* was at an end, and it is in vain to read such cases as have been cited, all of which are familiar instances of stoppage *in transitu*. What can they have to do with a case of bargain and sale of goods to be delivered on the wharf at *Liverpool* on certain conditions being complied with, which conditions are complied with? The delivery takes place, the *transitus* is at an end, and after that the right at law to stop these goods never existed.

Even if it were otherwise, there would apparently be a great deal to be said on behalf of the trustee. But I need not go into it. Upon the statements which have been made respecting *Whitworth's* siding, and the use which was from time to time made of it by *Whitworth*, I think the goods had come home when they were placed upon the siding. I think, moreover, that there was a constructive delivery to the purchaser of the whole of the goods by a delivery of part, if it were necessary, as in my judgment it is not, to resort to that doctrine. I think the taking out by the purchaser at his own mill of the cotton from several of the trucks, containing different parcels not distinguishable, and working it up in his own manufactory, as clear a constructive possession of the entirety as the law would require.

The only other thing to be noticed is, the act of the railway company, who, having gone on in an amicable manner, not demanding payment of their freight on the instant, but keeping an account of the transactions between themselves and *Whitworth*, bethink themselves all of a sudden that they will keep such of the goods as had not been carried across the railway (I do not use the word "delivered," but "carried across the railway"), until they are paid their charges. What has that to do with the question I have to consider? They may be right or wrong. Upon that I will not express any opinion. But of this I am clear, that their

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act cannot have altered any right which existed before. Their lien was upon what? Upon *Whitworth's* goods. It is because they were *Whitworth's* goods they claimed the lien. It is not necessary to dwell upon that part of the case at all, but in my opinion the order which has given to the trustee only part of the goods in question cannot be sustained. Neither can the order which gives to the vendor the other part of the goods be sustained. The proper order will be to declare that the trustee is entitled to the whole of the goods which were in the possession of the railway company as the agents, carriers, or anything you like to call them, of *Whitworth* at the time of the failure.

The cases which have been referred to do not affect the principle on which I have decided this case. *Wentworth v. Outhwaite* (1) is very plain and pointed, that although there were certain goods which were to be delivered to a man at a place thirty miles from *Leeds*, yet, as they were actually delivered at *Leeds* to a workman of his, the delivery to the purchaser was complete. Lord *Abinger* says (2): "It seems to me that a great part of the very learned argument which we have heard turns upon a question of fact, whether *Leeds* was the place of destination to which the goods were to be sent. It may be the place of destination at which the goods are to be at the consignee's risk, and I think that in this case it was the place where they were to be at his risk until he sent for them." In the very terms of the invoice that applies to the present case. Mr. Baron *Parke's* judgment is to the same effect (3). "I think the goods had arrived at their place of destination, for that, as I understand, means the place to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition." Then he quotes Lord *Ellenborough's* decision in *Dixon v. Baldwin* (4), observing: "After referring to the several cases on this subject, Lord *Ellenborough* says, 'In those cases the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and without such orders they would con-

(1) 10 M. & W. 436.

(2) *Ibid.* 449.

(3) 10 M. & W. 450.

(4) 5 East, 175.

tinue stationary.’” Then *Whitehead v. Anderson* (1) does not, in my opinion, assist Mr. *De Gex*’s argument. It is there stated by Mr. Baron *Parke* (2): “The law is clearly settled, that the unpaid vendor has a right to re-take the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at end.”

But without going further into the authorities, which, although numerous, are not by any means obscure or doubtful, it appears to me that the right of stoppage *in transitu* ended when the goods were delivered by virtue of the bills of lading to the purchaser’s agent, and that after that there could be no such right, for there was no *transitus* to which it could apply. I shall make no order as to costs.

Solicitors for Vendors: *Speechly & Co.*, agents for *G. E. Mumford, Bradford, Yorkshire*.

Solicitors for Trustee: *Johnson & Weatheralls*, agents for *George & Wade, Bradford, Yorkshire*.

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Ex parte CASTLE. *In re* MEIKLE.

Composition—Costs—Taxation—Higher or Lower Scale—Bankruptcy Rules,
1871, r. 8.

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Dec. 2.

Rule 8 of the *Bankruptcy Rules*, 1871, does not apply to a case of composition. Therefore the solicitor who acts for a debtor in relation to his liquidation petition is, if the creditors resolve to accept a composition, entitled as against the debtor to have his costs of the proceedings taxed on the ordinary (not the lower) scale, even though the debtor’s statement shews that his debts do not exceed £750 or that his assets do not exceed £200.

THIS was an appeal from a decision of the Judge of the *St. Alban’s County Court*.

In March, 1871, *William Meikle*, a licensed victualler at

(1) 9 M. & W. 518.

(2) 9 M. & W. 534.

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In re
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St. Alban's, filed a liquidation petition. His statement of affairs shewed that his debts amounted to less than £750, and that his assets were less than £200. The creditors resolved to accept a composition from the debtor. The debtor employed Mr. *G. Castle* as his solicitor in the proceedings, and he delivered to the debtor a bill of costs relating thereto amounting to £42 7s. 3d. The debtor objected to the amount, and the bill was referred for taxation to the Registrar of the County Court. He was of opinion that the 8th Rule of 1871 applied to the case, and therefore taxed the costs on the lower scale. The Judge confirmed the decision of the Registrar. *Castle* appealed.

G. Castle, the Appellant, in person :—

I contend that Rule 8 of the *Bankruptcy Rules*, 1871 (1), does not apply where the creditors have resolved to accept a composition. After that has been done the creditors have no interest in the debtor's assets as such. The rule was intended for the benefit of creditors, not of the debtor.

Bagley, for the debtor :—

It has been decided that the word "bankruptcy" in the Act includes "composition": *In re Thorpe* (2). The proceedings for liquidation and composition are commenced in exactly the same way, and until the creditors have met no one can tell whether there will be a bankruptcy, a liquidation, or a composition. The creditors prove their debts, and the debtor prepares his statement of assets and liabilities before the meeting. I say that the rule was intended for the benefit not only of creditors, but of all the suitors in the Court.

BACON, C.J. :—

While I am not fond of adhering too closely to the letter of a rule, I must in all cases give effect to its meaning and intention. I think that this rule is plain, not only in words, but in meaning

(1) Rule 8 provides: "Where any costs in bankruptcy or liquidation are incurred subsequent to these Rules, and the provable debts of the debtor do not exceed £750, or the estimated assets

do not exceed £200, a lower scale of attorney's costs shall be allowed, namely, three-fifths of the charges ordinarily allowed, disbursements being added."

(2) Law Rep. 8 Ch. 743.

and principle. I do not see that the creditors will be in any way prejudiced by my holding that it does not apply to a case of composition. Composition differs from both bankruptcy and liquidation by arrangement in this respect, that in both the former the whole estate of the debtor comes to be distributed among his creditors, whilst in a composition not a shilling of his estate has to be so distributed. The creditors accept the debtor's promise to pay the composition agreed upon. The costs of the proceedings have not to be paid out of any fund which belongs to the creditors, and the interest of the creditors is not touched in the slightest degree. These Rules of 1871 were prepared with great care, and with a perfect knowledge of the distinction between liquidation by arrangement and composition. The object of Rule 8 was to prevent the incurring of large costs where there was only a small estate to distribute, but there was no intention to benefit compounding debtors. To construe the Rule in the way suggested would be not only to insert in it a word which is not to be found there, but would be to alter entirely its meaning and intention. I think that the Appellant is entitled to have his costs taxed on the ordinary scale.

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CASTLE.*In re*
MEIKLE.

Solicitors: *G. Castle ; M. T. Hodding.*

Ex parte MASTERS. *In re* WINSON.

*Costs—Successful Appeal—Judicature Act, 1875 (38 & 39 Vict. c. 77),
Order LVIII., r. 5.*

C. J. B.

1875

Dec. 3.

In appeals from orders made by County Courts in Bankruptcy presented since the 1st of November, 1875, a successful Appellant will, as a general rule, be entitled to his costs of appeal.

THIS was an appeal from an order made by the Registrar of the *Leicester County Court*, acting as Judge, restraining *Thomas Masters*, a creditor of *John Winson*, whose creditors had resolved to accept a composition, from proceeding with an execution which he had levied under a judgment which he had recovered against *Winson*. For the purposes of this report it is unnecessary to state more fully the facts of the case.

C. J. B. *Bagley*, for the Appellant.

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Warmington, for the Respondent.

BACON, C.J., allowed the appeal, and discharged the order of the County Court.

Bagley, for the Appellant :—

The notice of this appeal was given on the 20th of November, 1875, after the Judicature Acts had come into operation. I submit that, in accordance with the rule recently laid down by the Court of Appeal with regard to appeals brought since the 1st of November, 1875, the Appellant should have his costs of appeal.

Warmington, for the Respondent :—

The Court of Appeal, in laying down the rule referred to, was acting under Order LVIII., rule 5, of the *Judicature Act*, 1875. But that Act has no application to the Court of Bankruptcy, which is expressly excluded from its operation. There is no reason, therefore, why the settled rule, that a successful Appellant does not get the costs of his appeal, should be altered.

BACON, C.J. :—

The rule recently laid down by the Court of Appeal is of general application. The Judges observed that the rule was one which had long existed in the Privy Council. I think I am bound to follow a rule laid down by such an authority. Though costs are in the discretion of the Court, I think it is a just and convenient rule that a successful Appellant shall in general be entitled to his costs of appeal. The Appellant in the present case must have his costs.

Solicitors for Appellant : *J. J. Rae*, agent for *Rawlins & Son*, *Market Harborough*.

Solicitors for Respondent : *Vizard, Crowder, & Co.*, agents for *Owston, Leicester*.

In re WESTERN OF CANADA OIL, LANDS, AND WORKS
COMPANY.

C. A.

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Nov. 11, 12.

CARLING, HESPELER, AND WALSH'S CASES.

Directors—Qualification found by Promoter—Fully paid-up Shares.

W. entered into an agreement with a person as trustee of an intended company for the sale to the company of a property for a certain sum in cash and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the company when formed. The company was formed, and the agreement was set out in the articles. *W.* applied to the Appellants to become directors, which they agreed to do upon his promising to transfer to them fully paid-up shares to qualify them. They acted as directors, and adopted the agreement for sale. The number of shares requisite for the qualification of a director was five, but after the completion of the purchase thirty paid-up shares were, by the direction of *W.*, allotted to each of the Appellants, and they were entered on the register as holders each of thirty fully paid-up shares, and received certificates to that effect. An order was afterwards made for winding up the company, and the Master of the Rolls settled them on the list of contributories for thirty unpaid shares each:—

Held, on appeal, that the Appellants, as to the shares allotted to them, stood in the same position as if those shares had been allotted to *W.* and transferred to them by him; and that, as there was no contract between them and the company that they would take shares independently of their accepting certificates stating them to be the holders of these fully paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares; and the order of the Master of the Rolls was discharged without prejudice to any application that might be made against them under the *Companies Act*, 1862, sect. 165, or otherwise, on the ground that they had entered into a corrupt bargain with *W.*

THIS was a motion by *Carling, Hespeler, and Walsh*, the three Canadian directors of the *Western of Canada Oil, Lands, and Works Company*, by way of appeal from an order of the Master of the Rolls putting them on the list of contributories for thirty shares each not paid up (1).

The company was registered on the 21st of December, 1871, with a nominal capital of £450,000 in £100 shares. Its principal objects, as stated in the memorandum of association, were to acquire certain lands, oil wells, &c., in *Canada*, and to carry on

(1) Law Rep. 20 Eq. 580.

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1875

CARLING,
HESPELER,
AND WALSH'S
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the businesses of oil distillers, manufacturers of chemical compounds, &c.

The third clause of the articles of association set forth an agreement dated the 18th of December, 1871, expressed to be made between *John Walker*, on behalf of himself and other vendors of the one part, and *William Hartley*, "as a trustee on behalf of an intended joint stock company to be registered in *England* under the title of *The Western of Canada Oil, Lands, and Works Company*," of the other part. By this agreement it was provided that the vendor should sell, and the company when incorporated should purchase, the lands, oil wells, &c., therein mentioned at the price of £400,000. The purchase was to be completed by the 31st of March, 1872. Of the purchase-money £150,000 was to be paid in money, and the remainder in 2500 fully paid-up ordinary shares of £100 each in the company. The agreement went on to provide that "This agreement shall not be binding until adopted by the company, nor thereafter unless and until a competent person, to be appointed by the directors of the said company, shall have certified to them that the intended debenture issue of the said company of £225,000, or such smaller amount as may be raised, is fully covered by the aggregate values of the various properties to be purchased by the said company; nor unless and until a good title shall be shewn to the said several lands and hereditaments respectively; nor unless the acreage of land shall be satisfactorily verified."

Clause 79 provided that the first directors should be appointed by the subscribers thereto, and should continue in office until the ordinary meeting of the company in 1874. Clause 80, that at any time before the first ordinary meeting the board might from time to time add to their number by the appointment of duly qualified members as directors, provided that the number of directors should never exceed nine. Clause 81, that the qualification of a director should be the holding of not less than five shares of the company in his own right. Clause 107, among other extensive powers given to the directors, authorized them to borrow in the name or otherwise on behalf of the company such sums of money on such terms as to interest and otherwise as they from time to time thought expedient, either by way of mortgage of the

whole or any part of the property of the company, or by bonds or debentures, or in such other manner as they deemed best.

The memorandum and articles were subscribed by seven persons, who took one share each, *Walker*, the vendor, being one of the subscribers. The agreement of the 18th of December, 1871, was registered.

The present Appellants were the three Canadian directors of the company—*Carling*, *Hespeler*, and *Walsh*. The account which *Carling* gave of the way in which he became a director was as follows:—

“Towards the middle of January, 1872, the said *John Walker* came out to *Canada*, and I had interviews with him on the subject of the above-named company. He brought out with him from *England* a copy of the prospectus which had been prepared in *England*, and issued, as I was informed and believe, by the directors in *England*, whose names appeared on the prospectus, namely [here followed three names]. The said *John Walker* brought out with him to *Canada* at the time aforesaid a copy of an agreement expressed to be made between the said *John Walker*, on behalf of himself and other vendors of the one part, and *W. Hartley*, as trustee on behalf of the above-named company, of the other part, whereby it was stipulated the said *John Walker* agreed to sell certain oil wells and property to the above-named company, by virtue of such contract, for a sum in cash and for 2500 fully paid-up ordinary shares of £100 each in the said company; and the said *John Walker* informed me that in the prospectus, under the notice respecting the debentures, my name had been inserted as one of the Canadian directors, and he asked me to act as a director of the company in *Canada*, stating that he would transfer to me certain fully paid-up shares in the above-named company if I would consent to act as such director, such shares being for the purpose of qualifying me as a director of the said company. I stated to the said *John Walker* that I would be willing to act as a director in *Canada* of the above-named company upon his informing me that a sufficient number of fully paid-up shares in the above-named company to qualify me as a director would be transferred to me.”

The statements made by *Hespeler* and *Walsh* as to what passed between them and *Walker* were precisely in the same terms.

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At a meeting in *Canada* of the three Canadian directors on the 23rd of January, 1872, the agreement of the 18th of December, 1871, was adopted. At a subsequent meeting on the 7th of February it was resolved that a certain part of the property agreed to be purchased should be omitted from the contract, and that the issue of debentures should be accordingly reduced by £25,000. It was stated by the Appellants in their affidavits that it was at the same time agreed between *Walker* and the directors that the vendors should make an abatement in the price to the extent of 500 of the fully paid-up shares which the vendors were to receive. The abatement appeared, however, to have been treated as being of 250 shares.

The prospectus above referred to, after being modified in conformity with the last-mentioned resolutions, was as follows:—

“Issue of £225,000 £12 per cent. mortgage debentures, in 2250 bonds of £100 each, secured by first charge on the company’s property.

“Redeemable by annual drawings at £130 per debenture, or convertible at the option of the holders into ordinary shares at par.

“Interest payable half yearly in London.

“The *Western of Canada Oil, Lands, and Works Company, Limited*.

“Capital £450,000,

of which £225,000 is reserved to meet the conversion of debentures into shares at the option of the holders.

“The share capital of £450,000, in 4500 shares of £100 each, receives no dividend until all the debentures have been redeemed or converted. 2250 shares are disposed of in terms of the prospectus, and 2250 shares are reserved for future issue or for purposes of conversion of the debentures.

“The 2250 mortgage debentures of £100 each are now offered for subscription.”

There followed a statement of the times at which the money advanced on the debentures was to be paid in, and three persons were named as trustees for the debenture-holders. There then followed the names of three persons as the directors in *England*,

and of the three Appellants as the directors in *Canada*. A considerable sum was received from the issue of debentures.

Sometime after the meeting of the 7th of February, 1872, the directors paid *Walker* the £150,000 out of the moneys arising from the debentures, and the purchased property was conveyed to the company. The dates did not appear, but a resolution mentioning that the land had been conveyed, and directing the solicitors to pay *Walker* the balance due to him, was passed by the Canadian directors on the 5th of July, 1872.

No shares in the company were ever allotted, except shares allotted to *Walker* or his nominees as fully paid-up shares. The affidavit of the Appellant *Carling* contained the following statement as to the allotment of shares to him, and the statements of the other Appellants were to a similar effect:—

“It was well known to the directors of the company in *England*, as I am informed and believe, that there were no other shares in the company than those shares which it had been agreed should be issued to the vendors as fully paid up, and that the directors of the company both in *England* and *Canada* were, by virtue of arrangements made with the said *John Walker*, to be qualified by having transferred to them a sufficient number of fully paid-up shares to qualify them to act as directors.”

The affidavit then proceeded to state that on the 4th of June, 1872, one of the English directors wrote to *Walker* asking for instructions as to the persons to whom the shares given for the property were to be issued, and that on the 6th of July, 1872, *Walker* telegraphed the answer: “Issue 1500 shares to *A. McEwen*, 30 shares *John Carling*, 30 *A. Walsh*, 30 *Jacob Hespeler*, 40 *W. F. Howell*, balance myself,” and that the directors in *England* proceeded thereupon to issue and register in *Carling’s* name thirty shares in the company. They also issued to him three certificates for ten shares each, which stated on their face that £100 per share had been paid. The deponent went on to say:—

“I never agreed to take any shares from the said company. I never saw the prospectus of the said company, nor did I know the nature of such prospectus until after the said company had been registered. I never subscribed the memorandum or articles of

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association. I never applied for any shares in the company, and (save as herein stated) I never covenanted or entered into any contract to act as a director of the company; nor would I have acted or assumed to act as a director of the said company unless I believed that a sufficient number of the fully paid-up shares agreed to be issued to the vendors, and which was the sole share capital of the company capable of being issued at the time at which I agreed to join the said company, to qualify me as a director, would have been transferred to me. The shares allotted to me over and above the number necessary to qualify me as a director were allotted to me without any previous request on my part, and I was not aware that they had been or would be allotted to me, until I received the scrip certificates for them."

On the 8th of November, 1873, an order was made for the compulsory winding-up of the company, and the official liquidator applied to settle the name of each of the Appellants on the list for five unpaid shares as a director, and for twenty-five fully paid-up shares. The Master of the Rolls directed the summons to be amended, so as to seek to place each on the list for thirty unpaid shares; and on the 10th of July, 1875, he decided that each must be on the list for thirty unpaid shares (1).

Chitty, Q.C., and *Dumergue*, for the Appellants:—

We admit that if there was any agreement or understanding between *Walker* and the Appellants before all matters between *Walker* and the company had been closed that the Appellants should receive paid-up shares, the Appellants cannot as against the company retain those shares. But it does not follow from this that they can be put on the list for those shares as unpaid shares. There was not, as there was in *Hay's Case* (2), any contract with the company to take shares. Acting as a director does not bind a person to take unpaid shares from the company; his obligation is satisfied by his having paid-up shares transferred to him: *Brown's Case* (3). The shares issued to *Walker* and his nominees are really paid-up shares: *Hartley's Case* (4); *Spargo's*

(1) Law Rep. 20 Eq. 580.

(2) Ibid. 10 Ch. 593.

(3) Law Rep. 9 Ch. 102.

(4) Ibid. 10 Ch. 157.

Case (1). There was no contract whatever on the part of the Appellants to take shares, except their acceptance of certificates for fully paid-up shares; and this contract cannot be split up—it must be maintained as a whole, or set aside as a whole. The Appellants may be fixed as trustees for the company of paid-up shares, but they cannot be turned into holders of unpaid shares.

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Roxburgh, Q.C., and *Whitehorne*, for the official liquidator:—

A person wishes to form a company and get a large bonus. He enters into a contract with a person expressed to be a trustee for the company, for the sale of property to the company at an enormous price, which contract is not to be binding till adopted by the company; he then gets a set of directors, whom he bribes by giving them part of the price.

[JAMES, L.J.:—There is no doubt that such a transaction cannot stand, but the question before us is whether this order gives you the proper remedy.]

MELLISH, L.J.:—May not the proper remedy be to fix the Appellants with the highest selling value of their shares?]

We submit not; but with the full nominal value, for these shares represent aliquot parts of the price.

[JAMES, L.J.:—Surely they represent aliquot shares of what is purchased?]

The Appellants must be charged with the full value of the shares: *General Exchange Bank v. Horner* (2); and there is no test of value but the nominal value. Then the Appellants are on the register, and are shareholders. The *prima facie* liability of a shareholder is to pay up the nominal value of his shares, and it lies on him to shew that he has done so. The Appellants cannot shew this.

[MELLISH, L.J., referred to *Currie's Case* (3).]

[*Jones's Case* (4) was also referred to.]

Currie's Case is distinguishable; for we are not here seeking to alter the contract.

(1) Law Rep. 8 Ch. 407.

(2) Ibid. 9 Eq. 480.

(3) 3 D. J. & S. 367.

(4) Law Rep. 6 Ch. 48.

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[JAMES, L.J.:—There was no contract between the Appellants and the company beside the acceptance of a certain document giving them fully paid-up shares. Are you not altering that by fixing them with unpaid shares?]

Where a director obtains the shares in breach of his duty to the company, he cannot hold them as fully paid up: *Ex parte Daniell* (1).

[MELLISH, L.J.:—That is an affirmance by one Lord Justice, the other doubting or dissenting. Has it been followed?]

JAMES, L.J.:—There was no contract there with a third party, under which paid-up shares could be created.]

Nickoll's Case (2) is to the same effect.

[MELLISH, L.J.:—That seems like the case where a subscriber to the memorandum of association gets paid-up shares transferred to him.]

Dent's Case (3).

[MELLISH, L.J.:—That stands on the same ground.]

Cleland's Case (4) favours our contention.

Chitty, in reply:—

The conduct of the directors hardly calls for the severe remarks of the Master of the Rolls. Nobody has been deceived; the debenture holders have got all the security they contracted for, and the seven subscribers to the memorandum knew all about the transaction.

[JAMES, L.J.:—It was represented to the debenture holders that the contract for purchase was subject to the approval of the directors, whom they had a right to suppose to be an independent body.]

Then there is no corrupt bargain as to any but the five shares. *Walker* only undertook to provide the necessary amount for a qualification, and after the purchase had been completed it was

(1) 1 De G. & J. 372. *2 In 2 B. 3* (3) Law Rep. 8 Ch. 768.
(2) 24 Beav. 639. (4) Ibid. 14 Eq. 387.

perfectly competent to the directors to accept a present of the other twenty-five shares from him.

[BRETT, J., referred to the wording of the affidavits of the directors, where it was said that *Walker* stated "that he would transfer to me certain paid-up shares," not saying "five."]

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As to *Ex parte Daniell* (1) there were no paid-up shares in the company, and the transaction merely came to this, that the directors declared that their own shares should be treated as fully paid up. Here there were paid-up shares, and *Brown's Case* (2) shews that it makes no difference that they were allotted direct to the Appellants instead of being allotted to *Walker* and transferred by him to the Appellants, in which case there could have been no question.

JAMES, L.J.:—

In a case in which, two or three days ago, we sustained a decision of the Vice-Warden of the Stannaries Court, making a gentleman, who had received shares under circumstances very analogous to those of the present case, pay the full nominal amount of those shares, we, in giving our judgment, expressly reserved the consideration of the main point which we have now to determine, that is, whether, under such circumstances, the shares can be treated as unpaid shares. We have now to determine that point, the question not being before us to what relief in any other form of proceeding the company may be entitled as against the Appellant. We entirely agree with the Master of the Rolls that these gentlemen committed a very grave and very reprehensible breach of trust in accepting a qualification from a person who was a vendor to the company, and with whom it would be their duty to deal as trustees for the company. But then the question arises, what is the mode in which relief is to be given in respect of such a breach of trust? Of course we are not capriciously to punish the persons who have committed it. We have to see that, if they are punished, they are punished in due course of law.

(1) 1 De G. & J. 372.

(2) Law Rep. 9 Ch. 102.

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The mode in which the Master of the Rolls has fixed these gentlemen is by treating as unpaid shares the shares for which they are entered in the register as holders of paid-up shares. Now beyond all question they never made themselves liable to take any shares at all—they never contracted to take shares or to pay for shares—the only contract between them and the company was the contract that arises from the fact that certificates of the shares as paid-up shares were sent to them and they accepted those certificates. If, therefore, the case depends on a contract between them and the company, the contract must either be approbated or reprobated. If the contract was a contract that they would take paid-up shares, we cannot convert that into a contract to take unpaid shares. These shares formed part of the shares which had been agreed to be given to Mr. *Walker* in part payment of his purchase-money, and I think that the case cannot be distinguished in point of legal result from what it would have been if the shares had been formally registered in the name of *Walker*, and then transferred by *Walker* to the directors in pursuance of his agreement with them. If that had been done in form, which was the substance of the transaction, it appears to me that it would have been impossible to treat the shares in the hands of *Walker's* transferees otherwise than as paid-up shares which *Walker* had got from the company, and which had been transferred from *Walker* to the directors. In that state of things the transfer would have been a simple bribe or present to the directors, constituting a breach of trust on their part and a misfeasance in respect of which they would have to account in exactly the same way, and on the same principles, as if he had handed them over a piece of property, or a diamond, or a sum of cash; that is to say, the company would be entitled to get back from their unfaithful trustees what the unfaithful trustees had acquired by reason of their breach of trust and misfeasance. That leaves the Appellants liable to be called upon under the 165th section, at the suit of the company or at the suit of any creditor of the company, to make such compensation as the Court shall think ought to be made under the circumstances with respect to the misfeasance. What the extent of that is it is not for us at present even to

shadow forth. It is not for us, I think, to express any opinion as to the mode in which the amount of the compensation is to be ascertained, because probably fresh facts may be produced before the Master of the Rolls, and it may have to be considered by him as an entirely new case upon that application, and it may have to be reconsidered by us, or whoever may constitute the Court of Appeal, when the case comes up for further discussion. I therefore purposely abstain from saying anything about what may be the possible results of any such proceeding against the Appellants, but I am of opinion that we cannot in law make these shares unpaid shares.

The only difficulty which occurred to me during the argument was created by *Ex parte Daniell* (1). That was a case in the Court of Appeal, but it was a decision of one Lord Justice affirming that of the Master of the Rolls, with a strong expression of doubt on the part of the other Lord Justice. But apart from that, there was there nothing like a contract with a third person which was fulfilled by transferring shares to the directors; there was simply a gift by directors to themselves, independently of any contract whatever, and without any bargain to which the transaction could be referred. The directors put themselves on the list as shareholders, and were then challenged to shew how they had paid up the shares. The Court held, and probably rightly, that it was not competent for them, having put themselves by their own act, without any contract, on the list of shareholders, to say, "We never meant to pay for those shares, and we took them as a present." It was a very strong case, and the Court thought that they could not set up their own entry of a payment which never was made, and could not be heard to say, "We meant to steal these shares from the company; we meant to take the company's property and divide it amongst ourselves." *Ex parte Daniell* is therefore distinguishable, in a very material point of fact, from the present; and I do not think we should be justified in treating it as governing this case. My opinion, therefore, is that the order of the Master of Rolls ought to be discharged, without prejudice to any application which the company or any person whatever may think it right to make under the 165th section of the Act.

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C. A. MELLISH, L.J. :—

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I am of the same opinion. I entirely agree that the acceptance of these shares on the part of the directors was a breach of trust, but I do not wish to give any opinion whether that breach of trust was confined to the five shares, or extended to the whole thirty; first, because I do not think that on this affidavit, which is the only evidence before us, any very satisfactory conclusion can be come to as to whether the original bargain related only to the five shares which formed the qualification, or related to the whole thirty; and, secondly, because, without a much more careful examination into the precise state of things as between the company and *Walker* at the time when the thirty shares were allotted, it is impossible to tell whether there did still remain duties to be performed by the directors for the benefit of the company as between the company and *Walker*, the existence of which would make the acceptance of shares from him a breach of trust, even although it had not been previously agreed. On the question, therefore, whether the breach of trust extends to the whole thirty shares, or only to the five shares, I wish to give no opinion.

But what is the consequence of the breach of trust, whether it extends to the five or to the whole thirty? There certainly are three things, any one of which the company might do. They might say, in the first instance, "These shares never ought to have been allotted to the directors at all;" and if they were now valuable shares they could say, "Transfer them back to us, for you never were entitled to them." Secondly, if the directors had sold the shares and made a large profit out of them, the company could have said, "Those shares were our shares, you were trustees for us, and therefore you shall hand over to us the entire profit you have made by selling them;" and, thirdly, the company might say, "Although you have made no profit by selling these shares, yet, by having had them allotted to you, you deprived us of the power of allotting them to other persons, therefore you must pay us the sum which we have lost by reason of our being deprived of the right of allotting those shares to other persons who would have paid them up." Of these three remedies the liquidators may, in my judgment, take whichever is most beneficial to the company. But can they do more? Can

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they say, "Although the shares which you have taken, which were the property of the company, were absolutely worthless or worth very little, both at the time when you took them and ever since, nevertheless, inasmuch as nominally they were £100 shares, we will make you liable for that full sum of £100 on each share?" In my judgment that would be inflicting an arbitrary punishment on a trustee for his breach of trust. It would not be indemnifying the *cestui que trust* for the injury he had sustained, but would be giving him a sum which, if the breach of trust had never been committed, he would not have acquired. This appears to me to be in principle wrong.

Now, the argument for the liquidator has been based upon *Ex parte Daniell* (1), and is in substance this:—"There are two steps in the breach of trust you have committed: first, the allotting the shares, which makes you a shareholder and member; and, secondly, the entering them as paid-up; and we are entitled to adopt so much of the transaction as relates to allotting the shares and making you a shareholder, while we repudiate that portion of the transaction which represents the shares as being paid up." *Ex parte Daniell* is rested on as an authority for that, but, in my opinion, there is a material distinction between *Ex parte Daniell* and the present case. In *Ex parte Daniell* there was no contract between any third person and the company entitling that third person to paid-up shares. The only contracts that took place were between the directors and the particular director to whom the shares were allotted. It was a case, in fact, in which directors made presents of the shares of the company to each other, and in that state of things it was held (and it is not necessary to say whether it was held correctly or not) that *quoad* the allotment the transaction might be ratified and as to the rest repudiated. Lord Justice Turner said that each of the two steps was a breach of trust, but I confess I should have rather thought it a more correct way of putting the case to say that *quoad* the allotment of the shares to the directors the transaction was perfectly valid, but *quoad* entering the shares as paid-up shares it was a breach of trust; and therefore, that what was a breach of trust could be done away with, while that

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(1) 1 De G. & J. 372. *34th Feb. 1875*

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which was not a breach of trust remained in force. But in the present case it is perfectly plain that there was a contract with *Walker*, by which *Walker* was entitled to a large number of paid-up shares, and that contract was registered so as to take the case out of the provisions of the Act of 1867; so that, if the shares had been given to *Walker*, he and any persons to whom he afterwards transferred them would have held them as fully paid-up shares. Now, I agree with what the Lord Justice *James* says, which I think is very strongly confirmed by what is said by Lord *Selborne* in *Brown's Case* (1), that the legal effect of an allotment of these shares to the directors at *Walker's* request is exactly the same as if the shares had been allotted to *Walker* himself as paid-up shares and then transferred by *Walker* to the directors. The shares in question were not allotted in pursuance of any contract made between the directors and the particular director to whom the allotment was made, but *Walker*, being entitled to have paid-up shares allotted either to himself or to his nominees, desired that they should be allotted to particular directors as his nominees, and they were accordingly so allotted. I feel grave doubt whether there is any contract between the particular person who accepts the shares and the company, beyond this, that of course, by being entered in the register as a paid-up shareholder, he at any rate becomes a paid-up shareholder. It appears to me, therefore, that there is nothing to compel us to do what I cannot help thinking it would be a great injustice to do, namely, to make gentlemen who no doubt have committed a breach of trust liable, not for the consequences of that breach of trust, but liable to pay to the company a sum of money which, if that breach of trust had not been committed, the company could not have recovered. It appears to me that the only contract entered into by these gentlemen with the company being that they became members of the company by accepting certificates of paid-up shares, that contract must either be adopted or rejected in its entirety. If it is rejected, they are not shareholders at all. If it is adopted, the company is entitled to say, "They are not your shares, but ours," but that does not make them hold unpaid-up shares. I agree, therefore, with the Lord Justice.

(1) Law Rep. 9 Ch. 102.

BRAMWELL, B.:—

I am entirely of the same opinion; and therefore I shall say nothing except that I should be very sorry to have it supposed for a moment that we consider these gentlemen not to have done wrong, as Mr. *Chitty* to some extent contended. I think that they have, and I think it very desirable that people should be taught that such a proceeding is wrong, for I believe that there are many persons who, not meaning to do anything morally wrong, are not conscious that they are committing a great error when they put themselves in the situation of having an interest adverse to those on whose behalf they ought to act. I think, however, that the law has quite sufficiently provided a remedy for misconduct like this, without doing what I think we should do if we supported this order, that is to say, distort the facts of the case, and find that to exist which in reality does not exist.

BRETT, J.:—

I am very sorry to be obliged to agree in this judgment. I should have been exceedingly happy if I could have agreed with the judgment of the Master of the Rolls, for I think that the law ought to be kept as wide as it can be, in order to put an end, if possible, to this system of directors taking paid-up shares; but it seems to me that we cannot in point of law hold that these persons are liable to pay to the company the amount of these shares as if they were unpaid. They can only be made liable to pay anything to the company in respect of these shares under a contract to pay calls in respect of them, or by reason of a breach of trust. Now, as I apprehend, there never was a contract at all between these gentlemen and the company with regard to these shares; they never entered into a contract with the company to take shares at all. If they had entered into a contract with the company to take shares, that would have involved a contract to pay for them. But by merely taking paid-up shares from a third person they certainly never entered into any contract with the company to pay anything in respect of those shares; and therefore they cannot be held liable to pay on the ground that they contracted to pay. The fact of their accepting these shares at the moment they did

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was a breach of trust, but the effect of that breach of trust is not to make them liable to pay the nominal amount of the shares, but to make them liable, as trustees of the company, for the real value of the shares. This, it seems to me, would have been the case before the Act of 1862; but under that Act there is a summary remedy given to the company or to the bond-holders by the 165th section; and I think, considering what answers may be made to some people and what answers cannot be made to others, it may be a matter of grave consideration, if it be thought necessary to make an application under the 165th section, in whose name that application shall be made.

Solicitors: *Lewis, Munns, & Longden; Harrison, Beal, & Harrison.*

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In re ANGLO-MORAVIAN HUNGARIAN JUNCTION
RAILWAY COMPANY.

Ex parte WATKIN.

Winding-up—Costs of Liquidation—Personal Liability of Official Liquidator to the Solicitor—Companies Act, 1862, ss. 97, 110.

The solicitor appointed by the official liquidator has no claim against the official liquidator personally for the costs of the winding-up, even though an order has been made on the application of the official liquidator that the costs should be taxed and paid by him to the solicitor.

THIS was an appeal from an order of Vice-Chancellor *Bacon*, sitting as vacation Judge.

Mr. *F. B. Smart* was appointed official liquidator of the *Anglo-Moravian Hungarian Junction Railway Company, Limited*, which was wound up under an order of the Court. He appointed Messrs. *Watkin & Clift*, with the sanction of the Court, as his solicitors in the winding-up under the power contained in the 97th section of the *Companies Act, 1862*.

On the 5th of August, 1874, Mr. *Smart* obtained an order to change his solicitors in the winding-up, and appointed Messrs. *Lowless & Co.* as his solicitors in place of Messrs. *Watkin & Clift*.

On the 28th of January, 1875, Mr. *Smart* obtained an order to

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compel Messrs. *Watkin & Clift* to deliver to Messrs. *Lowless & Co.* the books, papers, and documents relating to the winding-up the said company, upon payment of their taxed costs; and by the same order Messrs. *Watkin & Clift* were directed to deliver their bill of costs, as former solicitors of the official liquidator, and it was referred to the Taxing Master to tax the costs as between solicitor and client; and it was ordered that the said official liquidator should pay to Messrs. *Watkin & Clift*, within twenty-eight days after the filing of the Taxing Master's certificate, the amount of such taxed costs, without prejudice to a summons which was then pending to change the official liquidator.

Messrs. *Watkin & Clift* did not carry in their bill of costs till some time in the month of April, and the Taxing Master's certificate was not obtained till the 7th of August, 1875, just before the Long Vacation. Messrs. *Watkin & Clift* immediately applied for payment of their claim, but were told by Messrs. *Lowless & Co.* that they should not be able to get them a cheque signed till after the Long Vacation.

Messrs. *Watkin & Clift* then threatened to take proceedings personally against Mr. *Smart* for payment of their bill of costs; and on the 31st of August Vice-Chancellor *Bacon*, on the application of Mr. *Smart*, granted an injunction restraining them from issuing a subpoena for their costs, or from taking any other proceedings against the said official liquidator or his estate, or the estate of the company, or from enforcing or seeking to enforce payment of their taxed costs until further order; and that the time for payment of such costs should be extended to the 10th of November, 1875, or till such other time as the Court might think fit.

From this order Messrs. *Watkin & Clift* appealed.

Cracknall, for the Appellants:—

The solicitor appointed by the official liquidator is his solicitor, not the solicitor of the Court or of the company. It is true that he cannot be appointed without the sanction of the Judge, but that sanction is given to the appointment of a solicitor generally, not of the particular person: Gen. Ord. Nov. 1862, rule 68, Form 12. The case of *In re Trueman's Estate* (1) decided that in a volun-

(1) Law Rep. 14 Eq. 278.

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tary winding-up the solicitor in the liquidation had no claim against the liquidator personally, but that is because the *Companies Act*, 1862, s. 144, makes the costs of a voluntary winding-up the first charge upon the assets; but it is otherwise in a compulsory winding-up, in which case, under sect. 110, the costs are in the discretion of the Court. The solicitor, therefore, does not give credit to the assets but to the official liquidator who appointed him, and the ordinary relation of solicitor and client subsists between them. In *In re Massey* (1) there was a special agreement that the solicitor should look to the assets for payment of the costs. It may happen that an order may be made depriving the official liquidator of his costs of particular proceedings out of the assets: *Official Manager of the Grand Trunk, &c., Railway Company v. Brodie* (2). In such a case, unless the solicitor has a personal claim against the official liquidator, he will lose his costs altogether.

In the present case, however, the official liquidator has admitted his personal liability to his solicitor, for the order of the 28th of January was made with his consent, and, indeed, on his application. At any rate, the order now appealed from cannot stand, for it restrains the Appellants from applying to the Court of Chancery to enforce its own order, which still remains as a binding order on all parties.

Dickinson, Q.C., and *Everitt*, for the official liquidator, were not called on.

JAMES, L.J.:—

In this case the Vice-Chancellor has made an order restraining a personal execution against a gentleman who was an official liquidator of a company. Mr. *Cracknall* has raised two points. In the first place he contends that, on the general law, notwithstanding there is a liquidation, notwithstanding there has been a solicitor appointed with the sanction of the Court, the relation between the liquidator and solicitor is simply the ordinary relation of solicitor and client; that he is, in fact, doing the work and

(1) Law Rep. 9 Eq. 367.

(2) 9 Hare, 823; 3 D. M. & G. 146.

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labour on the retainer of the official liquidator on his personal responsibility. He is obliged to admit that the contrary has been long ago decided by Lord *Romilly* in the case of a voluntary liquidation; and it is impossible to read that decision without seeing that it really decided that which Vice-Chancellor *Bacon* afterwards decided, namely, that credit in these cases is given to the assets of the company; that is to say, that a liquidator is only the agent of the company. In a voluntary winding-up the liquidator is appointed by the company itself to act as their agent. In a compulsory winding-up he is appointed by the Court to act for the company; and that seems to be good sense, and has been so settled. The contract with the solicitor is a contract by him as agent for the company on behalf of the company, and to be carried into effect out of the assets of the company. That is so settled; and I think we should be very loth to disturb decisions upon the authority of which for years windings-up have been conducted.

That being so, the only other question is this, whether that being the law, and those being the rights between the official liquidator and the solicitor, the order that has been framed, and which has not been couched in very happy terms, is such as to introduce a new contract between them. I am of opinion, having regard to the facts, that the liquidator has no personal interest in the matter. It was nothing to him personally whether the papers were delivered up or not. He was only acting on behalf of the company, and asking for the papers for the purposes of the company, and it would require very strong words indeed to shew that he was making himself personally liable, without any consideration or any motive whatever for what he was not personally liable for before, and when the solicitor was not in any way altering his position. The solicitor gives up nothing; he still retains the same rights to the costs which he had before; he still retains a right to keep the papers on which he had a lien. All the order did was to ascertain the exact amount that was due to the solicitor, on the payment of which the solicitors were to deliver up the papers, not to the official liquidator personally, but to the new solicitor of the official liquidator, for the good of the company. It appears to me that the language of the order is not sufficient

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to lead us to suppose it was intended by the parties that their legal rights and liabilities should be altered by it. Therefore I think the Vice-Chancellor was right in acting in that view.

Then it is said the order goes too far, because it restrains the solicitor from taking any proceedings; but that means any proceedings against the official liquidator personally. It never was intended to prevent an application being made in Chambers to the Vice-Chancellor who has the conduct of the proceedings in the litigation to obtain a further order. It is only to be stayed until further order. It was quite open to any party interested in the matter to go before the Vice-Chancellor in Chambers, and ask for an order for payment out of the assets, there being assets sufficient. If the liquidator, having assets out of which he could pay it, will not pay it out of the assets, then the solicitor can ask to have the order made against him personally. I think the order imposes no difficulty on the Appellants, and I am of opinion that the appeal must be dismissed, and dismissed with costs.

MELLISH, L.J.:—

I am of the same opinion. I approve of the decisions in the cases before Lord *Romilly* and by Vice-Chancellor *Bacon*, in which it was held that in the case of a voluntary winding-up and a winding-up by the Court, the liquidator is not, in the absence of an express bargain, personally liable to the solicitor for the costs. The liquidator is in a different position from a trustee in bankruptcy. He has not the assets of the company vested in him. In the case of a voluntary winding-up he is the officer of the company who acts instead of the directors. He is no more personally liable for contracts which he makes on behalf of the company than the directors would be for the contracts they make on behalf of a company. In the case of a compulsory winding-up in the same way the official liquidator has not the assets vested in him, and the solicitor who is appointed with the sanction of the Court must be assumed, in the absence of an express bargain, to trust to the assets of the company.

That being so, the only question is on the construction of the order. I agree with what the Lord Justice has said, that it would require very strong words to induce me to believe that the official

liquidator, not being personally liable, has consented to an order making himself personally liable. I think the true construction of the order is, that the order is an order made against him in his character as liquidator to pay out of the assets.

BAGGALLAY, J.A. :—

I am of the same opinion. I will only add that it appears to me that the order of the Vice-Chancellor of the 31st of August, 1875, against which the present appeal is brought, bears on the face of it that all that was intended by the Vice-Chancellor was to preserve matters in the state they were in until an application could be made to Vice-Chancellor *Hall*, in whose Chambers the administration of the estate was going on. I think the extension of time until the 10th of November was an intimation of the opinion of the Vice-Chancellor.

BRETT, J. :—

I am of opinion that the solicitor appointed by the official liquidator according to the terms of the statute is appointed on the terms that he is to look to the assets of the company only, and is not appointed on the terms of looking to the personal credit of the official liquidator. That seems to me to follow from a consideration of the 97th and 110th sections of the *Companies Act*, 1862. A solicitor appointed according to the terms of the 97th section, is not any solicitor whom the official liquidator may choose. He has not the choice of all the world of solicitors from whom he may select one at his own option; he is confined to the appointment of such a solicitor as the Court may sanction. According to the 110th section, the Court has power to order that the costs of the solicitor shall be paid in priority to the costs of the liquidator. Now, both of these considerations are, in my opinion, wholly inconsistent with the idea that a solicitor is appointed by the official liquidator on the terms of looking to his personal credit. I should have thought so if the statute stood alone, but I further think that the decision of the Master of the Rolls in the case which has been cited gave that construction to the statute which I think the statute itself would bear. If it did not, I think that the reasoning of the Vice-Chancellor *Bacon*, in the case of

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In re Trueman's Estate (1), is a reasonable one, which cannot be answered, and shews that this is the true interpretation of the statute. Therefore, even if it were right to say, as has been argued, that the Master of the Rolls' decision does not conclude the point, I think that the case before Vice-Chancellor *Bacon* decided it in the most express terms. The solicitor does not look to the personal credit of the official liquidator, he looks only to the assets, and if the assets are not sufficient to pay in full, he loses the difference between the amount of his costs and the assets. Even although the assets are not sufficient, he cannot look to the official liquidator as personally liable to him for the difference; therefore I entirely concur in the view that according to the true construction of the Act there is no personal liability at all on the part of the official liquidator to the solicitor.

Then it is argued that there is a decision of the Court of Appeal in Chancery inconsistent with that view, *Official Manager of the Grand Trunk, &c., Railway Company v. Brodie* (2), where an order was made that the official liquidator should be personally liable to pay the costs of the opposite party, because he had appealed without, as the Court thought, sufficient grounds. That is very different. That is not a matter which depends on contract. The alleged personal liability of the official liquidator to the solicitor is put as on a contract between him and the solicitor. In the case cited there was no pretence for a contract; it was an order of the Court against a litigating party for having improperly instituted that litigation. I cannot see that it is any authority for the proposition which it was cited to support.

Then as to the second point in this case, if there was no personal liability according to the statute, and the understanding of the parties originally, it seems to me a very strong proposition to say that the official liquidator, without any consideration, resolved to make himself personally liable by agreeing to an order made on him for the taxation of the costs. He might do so, I suppose, but it would require very strong words to lead me to believe that he intended to make himself personally liable when, according to law, he was not liable. I do not think he so intended, and I do not think the words lead to that conclusion.

(1) Law Rep. 14 Eq. 278.

(2) 3 D. M. & G. 146.

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Therefore I think, neither on the law or on the order itself was the official liquidator here personally liable. That being so, the attempt to issue execution against his personal property in the Long Vacation was wholly unjustifiable, and was properly stopped.

Solicitor for Appellant : *A. Brown.*

Solicitors for Respondent : *Lowless & Co.*

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Bankruptcy—Fictitious Bills—Proof.

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Traders in the country accepted bills fraudulent against their creditors for £1727 drawn on them by their *London* agent. The agent sold the bills for £200. Three days after the sale the traders presented a petition for liquidation; and they were afterwards made bankrupts:—

Held, that, under the circumstances, the purchaser of the bills must be taken to have had notice that the bills were fraudulent on the creditors of the traders, and would be allowed to prove in the bankruptcy only for the sum paid by him for the bills.

Quære, whether it is now the rule, that the holder of an accommodation bill can prove for the full amount and receive dividends to the amount of the sum advanced by him (*Cooke's Bankruptcy* (1); *Ex parte Bloxham* (2)).

Order of *Bacon, C.J.*, varied.

Assumed by H/L. 20/11/86
J. GOMERSALL and **J. F. Gomersall** were woollen manufacturers at *Dewsbury*, and employed one *Searby* as their agent in *London*. In August, 1874, they were in great difficulties, and contemplated a bankruptcy, but they still wished to raise money. *Searby*, acting on their instructions, drew on them fourteen bills of exchange of various dates and for various sums. These bills he sent to *J. Gomersall* and *J. F. Gomersall*, who accepted and returned them. *Searby* then indorsed them and gave them to one *J. F. Lovering*. *Lovering* took four of them, for sums amounting to £1727 2s., to *Jesse Jones*, who described himself as "gentleman," and offered to sell them to him. *Jones* kept them for several days, and, as he stated, made inquiries, from which he learnt that the acceptors would be unable to pay in full, but were

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possessed of assets, and that there was a fair chance of his obtaining payment of part; and he had no reason to believe that the bills were not drawn according to the date and tenor thereof. He further stated that he had made no inquiries as to the consideration for the bills, and that he had never before bought any bills. On the 31st of August, 1874, he gave £200 for the bills, paying the money by a cheque made payable to *Searby*. *Searby* received the money, but it did not appear into whose hands it ultimately came. The rest of the bills, for sums amounting to £3593, were bought under very similar circumstances by one *J. W. Bennett* for £250.

On the 3rd of September, 1874, *J. Gomersall* and *J. F. Gomersall* filed in the *Dewsbury* County Court a petition for liquidation by arrangement, but the arrangement failed, and they were, on the 5th of October, adjudicated bankrupts. It was stated that *Searby* had also been made a bankrupt.

Jones and *Bennett* each applied to the County Court at *Dewsbury* to prove for the full amount of the bills held by them; and the Judge of the County Court made an order that on payment by the trustee in bankruptcy to *Jones* of the sum of £200, and to *Bennett* of the sum of £250, their proofs should be rejected.

Jones and *Bennett* each appealed to the Chief Judge in Bankruptcy, who allowed the proofs for the full amounts for which the bills were drawn (1).

(1) 1875. July 12.

BACON, C.J. :—

It is, in my opinion, impossible to accede to the arguments of the Respondents, or to take into consideration how disastrous such dealings as took place between *Searby* and these *Gomersalls* must be to the interest of the commercial world. *Jones* has become the owner of the bills of exchange, and, as he says, *bonâ fide*. The sole questions, therefore, for me, are whether he is the true owner, and whether he became the true owner for valuable consideration or not. According to his story, and the story he has told has not been contradicted, he made inquiries

about these bills, and he thought that the man who was liable on them was good for something. He did not know that he would be paid in full, but he thought that the bills were worth buying for £200, and he was willing to take his chance of what he might get out of a tolerably solvent estate. If *Jones* had acknowledged that he was himself cognisant of all the transactions which had taken place, then no doubt it would have been necessary to have had recourse to the law to defeat such transactions, but there is no evidence of that state of things. The bills were sold in the market, and bought by him with a knowledge of the circumstances of the men who were

Jesse Jones had been cross-examined before the County Court. The letter books of the bankrupts were also produced, and shewed very clearly what was the real nature of the transactions between them and *Searby*. The conclusions drawn by their Lordships from the evidence appear sufficiently in their judgments. It was stated that the estate of the bankrupts would pay 7s. or 8s. in the pound.

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J. Gordon, the trustee in the bankruptcy, appealed.

The appeal on *Jones's* proof was heard before *James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.

De Gex, Q.C., and *Finlay Knight*, for the trustee:—

These are fictitious bills, and if so, the holder ought not to be allowed to prove for more than he gave for them; at all events, he cannot receive more than he gave; *Cooke's Bankrupt Laws* (1); *Lee's Bankruptcy* (2); *Re Bentley* (3); *Ex parte Bloxham* (4).

Marten, Q.C., and *E. C. Willis*, for *Jones*:—

The debtors had a right to raise money in this way, and they, no doubt, hoped, by means of the money, to extricate themselves from their difficulties. It may be worth while for a man in trade to raise money for a time, even in this way. He might have sold goods at a low price, and the purchaser would have kept them. *Searby* was known to be agent for Messrs. *Gomersall*, and *Jones*

liable upon them, at a price which he was willing to give for them, and which, in fact, was his own price. It is not the case of a man buying an accommodation bill, where the bankruptcy law lays it down that a man can prove only for the money which he has actually paid for the accommodation bill. These are not accommodation bills at all, but bills drawn by a man in *London*, a commission agent, in the ordinary course of trade, on a manufacturer in the country, and accepted by him, and there was nothing on the face of the bills to raise the slightest suspicion. When *Jones* talked of risk, the only risk that he meant was whether he would ever get back his £200. If

Jones could sustain an action, as no doubt he could, against the drawer and acceptors of these bills, he being the *bonâ fide* holder for valuable consideration, then he can prove upon them. I do not wonder at the impression made upon the learned Judge's mind when the details of all these nefarious transactions came out before him, but I cannot think that his decision was according to law, or that *Jones*, who acquired the bills under these circumstances, is not entitled to prove for the whole amount.

(1) 8th Ed. p. 176.

(2) Page 262.

(3) 2 Mont. & A. 123, 137.

(4) 6 Ves. 449.

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has sworn, and there is no evidence to the contrary, that he had no knowledge that the bills were not drawn in the course of trade. The bills were hawked about, and *Jones* had a right to buy them as cheaply as he could, and no one has a right to inquire what he gave for them. If the debtors had not failed, they could have been sued on these bills, and *Jones* can now prove on them, for the trustee merely represents the debtors. There is no suggestion that the money raised on these bills has been misapplied, and probably the creditors have the benefit of it. Sects. 92 and 94 of the *Bankruptcy Act*, 1869, are now the law, and have made such purchases valid.

The appeal on *Bennett's* proof was then heard before *James, L.J., Mellish, L.J., Baggallay, J.A., and Brett, J.* The same counsel appeared, and the arguments, so far as they affect this report, were the same as those in the appeal on *Jones's* proof.

Nov. 24. JAMES, L.J.:—

These are appeals from the Chief Judge reversing the decision of the County Court Judge. The Chief Judge in effect admitted the Respondents *Jones* and *Bennett*, one to prove for £1727 2s. and the other for £3593, as the holders respectively of two lots of bills. The case of *Jones* was heard before the Court, consisting of three of their Lordships, and the other case was heard before the Court as now constituted. I will deal first with the case of *Jones*, but the cases, I think, substantially are the same.

Jones's debt, according to his own account, is created in this way:—[His Lordship then stated the principal evidence in the case.] Now, it is quite clear from the letters, that as far as regarded the *Gomersalls*, and as far as regarded *Searby*, these bills were mere shams and fictitious things got up for some fraudulent purpose connected with the impending bankruptcy. The question is, whether *Jones* is in any way affected by that fraud so as to prevent him from proving in the bankruptcy for the amount of the bills. It is to be noted that *Jones*, although he says he received information that the acceptors would be unable to pay the bills in full, as they were in difficulties, knew that they were in possession of

assets, but he does not tell us what he knew about *Searby*. He did, however know, that *Searby* was in a state of hopeless and reckless insolvency, for nobody other than a person hopelessly and recklessly insolvent would do what was done on this occasion; that is to say, in consideration of £200, not merely sell the acceptances of some third party, but make himself personally liable for the whole amount of £1727 2s., one part of which was a sum in respect of which he could have been made bankrupt, or could have had judgment and execution levied against him within a few weeks. In the course of the argument I put it to Mr. *Marten*, whether, if the transaction had, instead of £200 for £1700, been £20 for £17,000, it could have stood, or whether, if the bills had been brought to *Jones* by somebody, say the street crossing sweeper, as the possessor of the bills, the transaction could have stood; and he of course was obliged to admit that he could not in that case have contended that such a transaction could stand.

I am of opinion that the circumstances here really amount to exactly the same thing, that is to say, the case here is as conclusive to my mind as the case which I have suggested would be, and that *Jones* must have known at the time when he took these bills from such a man in such circumstances, that they could not have been honest bills honestly belonging to *Searby* and honestly negotiated by him. The transaction, to my mind, was saturated with fraud, of which *Jones* had notice.

I am of opinion, therefore, that he took these sham bills with sufficient notice that they were sham bills. That being so, I am of opinion (differing in this respect on a conclusion of fact from the Chief Judge), that *Jones* must be taken to have had notice of the fraudulent or sham character of the bills with which he was dealing, and therefore that he is not entitled to prove.

The County Court Judge was of opinion that he was entitled to hold the bills and to prove, receiving dividends to the extent of £200, basing himself in that respect upon some old law, which I think certainly had been settled more than once by old decisions, that where there were accommodation bills with a smaller consideration given, they could be treated as security for that amount, and that the holder was entitled to prove for those bills, and receive dividends up to the sum actually advanced.

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It is not necessary for me to inquire into those cases. These bills were not accommodation bills; they were merely sham bills; and the impression on my mind with regard to the transaction is, that *Jones* must have known that *Searby* was only a sham, that he was the agent for the *Gomersalls*, and that the transaction was a payment to the *Gomersalls*, through their agent *Searby*, of the sum of £200, and that *Jones* is entitled to prove for the £200, and for no more than the £200, which was the sum paid by him, and he is entitled only to a dividend on the £200.

The case of *Bennett* is exactly the same in substance, and I do not think it necessary to go into it.

MELLISH, L.J. :—

166L D333  
 In this case the County Court Judge decided that the trustee having offered to pay *Jones* the £200, he was not entitled to prove. The County Court Judge acted apparently on the authority of some old cases which are mentioned in *Cooke's Bankrupt Law* (1); but in my opinion those old cases really have nothing to do with the case before us, because in them bills had not been bought, but the money had been advanced on the security of the bills. In those cases it was held that if the bill was for value as between the drawer and the acceptor, the holder having advanced money on the bill, might prove against the acceptor for the full amount, and take dividends until he had received the sum he had advanced, that is to say, until he had received the sum which he could have recovered in an action against the drawer. But I rather think it was held that when they were accommodation bills he could not do that, because in the case of an accommodation bill you cannot sue the acceptor for any larger sum than you can sue the drawer for. But whether that be so or not, those cases have, in my opinion, no bearing upon the present case, which is not a case of an advance on the credit of a bill, but is the case of the purchase of the entire value of the bill; and in my opinion the Chief Judge held rightly that in the case of the purchase of the entire value of the bill, if there be nothing else to affect the right of the holder, he may prove and receive dividends on the full amount, just as he might maintain an action against both the drawer and the acceptor for the full amount.

But the case before us is of a totally different kind—namely, that these were bills which, as between the drawer and acceptor, were drawn and accepted for the fraudulent purpose of raising money, so as to cheat the creditors of both drawer and acceptor, and that the two holders of the bills had notice of that fraud at the time when they became the holders of the bills; and it raises what, to my mind, is a very important question, because, as far as I am aware, this is a new fraud. I think, if it had been an ordinary practice, we should have heard of it in the Bankruptcy Court long before this, and I should like, in the first place, before I come to consider what the effect is of these being bills to which there are two parties, to see what would be the nature of such transactions if they had taken place between the debtor and one party.

Now, it is quite obvious that, whether it be by the sale of goods or the advance of money, if a debtor has any amount of assets, it is perfectly possible, on the eve of his insolvency and on the eve of his petitioning the Court of Bankruptcy for liquidation, for him to raise money or obtain goods from another person who knows of his insolvency, upon such terms that the dividend which may be reasonably expected will give a full profit to the man who makes the advance or sells the goods. How, then, ought the Court of Bankruptcy to treat such a case as that? In the first instance, let us suppose the case of the purchase of goods, and that a contract in the ordinary way, with bought and sold notes, is entered into for the purchase of goods at four times their value, to be paid at the end of a month, in the expectation that though the seller knows he will not get that amount the dividend will give him a good profit. How would the Court of Bankruptcy decide such a case as that? Would it not say, without the slightest hesitation, “You can prove for the value of the goods—not for this fraudulent bargain to receive four times their value.”

Of course such a thing as that has never happened, and never will happen, because in the case of such a contract as I have supposed the fraudulent nature of the thing is palpable. Then, suppose the case of a loan of money, and that a money-lender refuses to advance any money, even at 60 per cent., because he knows that the trader is on the point of failing. Suppose that then the trader

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says, "If you will lend me £200, I will enter into a written contract with you to pay you £2000 at the end of a month," and the money is advanced accordingly, would such a transaction as that stand? There is a little more difficulty in proving the real nature of the transaction than in the case of the goods which I have supposed, but in my judgment it would not stand more in that case than in the other.

One test with regard to the case of a simple loan of money would be this, that the lender does not bargain for interest. No amount of interest would make him safe, because he knows that the trader may fail or become bankrupt the next week or day, and then the interest would stop. He must therefore have a bargain for a lump sum of a large amount in consideration of making a small advance. The Court of Bankruptcy would not be taken in by such a transaction as that, but would say, "You cannot prove for the full amount, but only for the amount which you actually advanced."

What difference, then, does it make when you have the case of a bill to which there are two parties, drawer and acceptor? There is this difficulty, and it is the only difficulty, to my mind, in this case—that you must be able to come to the conclusion that the person who buys the bill had notice that the bill was not a good bill as between the drawer and the acceptor; because, if the bill had been originally of such a nature that the drawer could have proved against the acceptor for the full amount of the bill, then, in point of fact, the creditors of the acceptor would not be damaged by the price that anybody might give the drawer for the bill. There must, therefore, be such facts as will fairly lead to the conclusion that the man buying the bills or discounting them had at the time notice that they were not good bills as between the drawer and acceptor, so that the drawer could have proved against the acceptor for the full amount.

That is the only part of the case about which I have entertained any doubt. But I have come to the conclusion, on considering it, that there really is sufficient evidence of notice. If there are such facts as, in the mind of a Court or jury or any reasonable man, would leave no doubt that the case was tainted with fraud, and not only that, but that the holder of the bills must have known

what the particular fraud was—he must be held in that case to have had notice of the fraud.

Now, let us see what the case is here. The bills are dated back. Possibly *Jones* did not know when they were drawn, but I need not go into that question. He manifestly knew that both parties were hopelessly insolvent, probably that the drawer could pay nothing at all, but that the acceptors, although likely to become bankrupt, had assets sufficient to pay a dividend. What right had he to suppose that an utterly insolvent drawer—a man who would do such a thing as sell bills for £200, and in a short time afterwards have a claim against him for £1700—would have kept these bills in his possession for two or three months after they were drawn, never receiving any money at all upon them, if he had had a good claim against the acceptor? It appears to me that, if *Jones* had not absolutely shut his eyes, there was sufficient for him to come to the conclusion, looking to the state of both these parties, that these bills were drawn for the purpose of enabling them recklessly to raise money on the eve of bankruptcy. That being so, it appears to me that the Court of Bankruptcy must allow the holder to prove only for the amount actually advanced.

Of course, frauds on the eve of a bankruptcy for the purpose of raising money for some temporary purpose have been common enough, but usually they have been frauds upon the person who advances the money or sells the goods to the bankrupt. The peculiarity of this case is, that it is not a fraud on the person who advances the money, but upon the general body of creditors. I am of opinion that we should be very unworthy descendants of the Judges who first set up the doctrine of fraudulent preference, and the doctrine that an assignment of all a man's property as security for past debts was an act of bankruptcy and fraudulent, if we allowed a palpable fraud of this sort to prevail. The consequence would be that any debtor on the eve of bankruptcy who wanted money for some temporary purpose, as persons on the eve of failure constantly do, to stave off bankruptcy for a week, or to favour some special creditor, or to lay by money for himself after his bankruptcy, or for some fraudulent purpose of

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that kind, would be able to obtain it at the expense of the general body of his creditors, thereby reducing his dividend from 15s. to 10s., or from 10s. to 5s., or from 5s. to 2s. 6d., just as he pleased.

In my opinion the Court of Bankruptcy should not tolerate such a fraud, but should say in such cases that the party can only prove for the actual amount of his advance. No doubt it requires some little stretch in favour of *Jones* to allow him to prove for the amount of £200, because if it was an advance only to *Searby* and not to *Gomersall*, in my opinion he could prove against *Searby's* estate alone, and not against *Gomersall's*. But I think there is evidence in those letters, of which we may give him the benefit, that the whole thing was done by *Searby* at the *Gomersalls'* request, and I think we may fairly find that the *Gomersalls* were the real principals in this transaction, and therefore that *Jones* may be allowed to prove to that extent.

BAGGALLAY, J.A. :—

I am of the same opinion. I fully recognise the importance of maintaining the well-established principle that negligence or carelessness on the part of the holder of a bill is not of itself sufficient to deprive him of his remedies for procuring payment of its amount. But negligence or carelessness when considered in connection with the surrounding circumstances may be evidence of *mala fides* ; and the question in this case is, whether the surrounding circumstances accompanying the negligence or carelessness of Mr. *Jones* were such as to affect him with notice of the fraudulent character of the transaction out of which these bills originated.

Now, I am not disposed to regard the purchase or discounting of a bill for a small fraction of its nominal amount as necessarily implying or suggesting that there was fraud in the inception or preparation of the bill. I can imagine the case of a holder of a bill, the drawer and acceptor of which were both perfectly solvent at the time when the bill was drawn and accepted, but from subsequent events had become so far insolvent that there was no hope whatever of the holder of the bill, who had given a fair and full consideration for it, ever obtaining its amount. I can imagine that in such a case the holder of the bill, being either unwilling

to meet the delay which would occur before he could recover from the estate of the insolvent, or unwilling to run the risk of what he might ultimately recover in that way, might honestly sell that bill to another party for a third, fifth, or tenth, or even a smaller fraction of its nominal value, protecting himself from liability upon it by indorsing it "without recourse." But what are the facts which we have to deal with here? Taking the transaction on the face of it, and as *Jones* states it, you find *Searby*, the party who desired to sell these bills for £200, placing himself at once in the position of being liable to be sued within a few weeks for the whole sum of £1700 in respect of them. Surely it must at once have suggested itself to *Jones* that there was something very extraordinary in the whole transaction that *Searby* should have been willing to render himself liable for £1700 at the end of two or three weeks to secure to himself an immediate payment of £200. The answer to that on the part of *Jones* would probably be that he well knew that *Searby* was in a state of insolvency, and therefore it did not much matter to him whether he rendered himself liable to a larger sum or not; but directly you take that line of defence you are met with this difficulty—that it was done by *Searby* for the purpose of enabling a fraud to be practised on all the creditors of *Searby* as well as on those of the *Gomersalls*, by allowing proofs to be brought in for a larger amount against them, thereby reducing the amount of the dividend which they would receive under the bankruptcy. It appears to me that those were circumstances which must have been brought to the mind of *Jones*, and if he wilfully chose not to make those inquiries which the nature of the transaction suggested, he must take the consequence of not having made them, and must be treated as having had notice of the transaction itself.

The only doubt which I entertain in this matter is that which has been alluded to by Lord Justice *Mellish*. I must confess that it appeared to me that *Jones* should be treated as having had complicity in a fraudulent transaction, and should not be allowed to prove at all. But as it appears to the Lords Justices that he should be allowed to prove for the sum of £200, my doubts are not so strong upon the point as to induce me to express a contrary opinion.

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C. A.        The case of *Bennett* is even worse. Not only was a smaller  
 1875        sum paid for the bills, but some of them were overdue when  
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 In re        *Bennett* gave his cheque on the 3rd of September for the £250  
 GOMERSALL. as the price of them. However, apart from that transaction, they  
 — are affected by the general considerations which I have men-  
       tioned with regard to *Jones's* case, and I think that the order  
       proposed to be made by the Lords Justices is quite right.

BRETT, J.:—

I apprehend that the argument in favour of full proof here is this, that the bills at their inception were honest bills between the drawer and the acceptor, and that the person who bought those bills bought them honestly, though for a small price; or that, though the bills might be fraudulent in their inception as between the drawer and acceptor, the purchaser of the bills at the time he purchased them had no notice of anything wrong in regard to the bills. On the other side, the argument against the allowing full proof is, that these bills were fraudulent in their inception, not that it can be said that they were fraudulent as between the drawer and the acceptor, because both knew the circumstances under which they were drawn and accepted, but that as between those two it never was intended that either of them should be responsible to the other in respect of the bills, so that in point of truth the bills were sham bills as between them, and that these bills were drawn and accepted by them at a time when they both knew that they were insolvent, and when both were contemplating immediate bankruptcy, and that, therefore, those bills, besides being sham bills as between themselves, were fraudulently concocted bills as against the creditors on both their estates. It would follow that the purchaser of the bills, at the time when he purchased them, although he may not have known all the circumstances of the fraudulent inception of the bills, yet knew so much as to make the purchase of the bills by him really a purchase with notice that there was a fraud, and that it was a fraud contemplated on the creditors.

Now, we have to determine both the law and the facts; and as to the first, I think that, if it cannot be said that these were accommodation bills, it must be shewn that they were fraudulent

bills in their inception ; and if they are proved to be such fraudulent bills, that the person who bought the bills had at the time he bought them, although he had not knowledge of all the circumstances of the fraud, really knowledge that they were fraudulent bills. I think the evidence must go to that extent, otherwise I agree that the purchase of these bills, though for a very small sum, would not prevent him from proving for the whole amount of them. The main question really is, how should we find the facts? If a jury has to consider facts, they are entitled and bound to make use of their general knowledge of business in order to appreciate the evidence which is before them, and if a Court has to consider evidence, I think the Judges are bound to use their own general knowledge of business and of the ordinary moving motives of mankind just as a jury would.

[His Lordship then stated and commented on the evidence as shewing that the bills must have been intended when they were drawn as a fraud on the *Gomersalls'* creditors, and that the intention was that all or the greatest part of the money should go to the *Gomersalls*, and that *Bennett*, when he gave money for the bills, must have discovered that these unnegotiated bills were drawn by a man who had no credit at all, and who had no right to draw upon the other man who at that time was also insolvent, and that *Bennett* knew that the drawer, at the time when he gave this money for the bills, was going into bankruptcy, but with an estate which would produce something more than the £250 which he gave for the bills.]

To my mind that is such an amount of knowledge as really is equivalent to a knowledge of the fraudulent motives with which these bills were drawn, and of the fraudulent way in which these people intended to act. Therefore I think that in a Court which has to deal with bankruptcy, it would be monstrous to allow such a transaction to stand.

There is another point which to my mind is evidence of his fraudulent knowledge. When goods are stolen, and the question is whether the receiver knew that the goods were stolen, one very material fact always to consider is, whether he gave the ordinary trade price for the things, or whether he gave a much less price.

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The giving a much less price than the ordinary trade price is not absolute proof, but it is very strong evidence of fraudulent knowledge on his part. And so here the amount of the price is very strong evidence against the purchaser of these bills. Therefore I think that the asserted purchaser of these bills had such notice as disentitled him to prove in respect of the bills, not on account of any fraud on the *Gomersalls*, but on account of the fraud upon the creditors.

And now comes the question whether he is to be entitled to prove on the *Gomersalls*' estate. Having got rid of the bills, it seems to me inequitable as against him to say that he should not be allowed to prove for the actual money which has passed from him to the *Gomersalls*. I have given the reasons why I think that this money was not meant for *Searby* (because if it was he must only prove on *Searby*'s estate), but was really meant for the *Gomersalls*, who were the concocters of the whole of this fraud, and who used *Searby* as their instrument.

I think, therefore, that, as the money which the purchaser of the bills paid did go to the *Gomersalls*, their estate should pay in respect of that sum of money as if it were money lent to them, and that will be a dividend on the £250.

JAMES, L.J.:—

The Respondents are to pay the costs in both the Courts below.

Solicitors for Appellant: *Williamson, Hill, & Co.*

Solicitors for Respondents: *Rooks, Kenrick, & Co.*

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Prosecution of Bankrupt—Obtaining and Pledging Goods otherwise than in the ordinary way of Business—Debtors Act, 1869, s. 11, sub-ss. 13, 14, 15.

1875

Nov. 29.

A trader being in insolvent circumstances, purchased goods on credit, and shipped them to *Australia*, and obtained advances by pledging the bills of lading. Within four months afterwards he became bankrupt. In his examination he stated that he could give no account of what had become of the purchase-money :—

Held, that in the absence of any evidence of the bankrupt having obtained the goods on false representations, his conduct did not constitute an offence under the 14th or 15th sub-sections of the 11th section of the *Debtors Act*, 1869; and an application by the trustee for an order to prosecute him was refused :

Held, also, that he had not committed an offence under the 13th sub-section of the same section.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy, refusing to order the prosecution of the bankrupt, *Henry Haruby Hodgson*.

Previously to the bankruptcy *Hodgson* carried on business in partnership with *F. A. Denham* in *Clements Lane*, in the City of *London*, as general merchants. It was in evidence that the firm had been in insolvent circumstances since the beginning of 1874, but it continued to carry on business till the 28th of January, 1875, when a petition for adjudication was presented. The firm was adjudicated bankrupt on the 25th of February.

On the 24th of October, 1874, *Hodgson*, who was the principal manager of the business, purchased twenty-five bales of linen from Mr. *Dow*, of *Dundee*, for £282; and on the 11th of November he purchased from the same house ten more bales for £226. *Hodgson* shipped these goods to correspondents in *Australia* for sale, and pledged the bills of lading at the time of shipment to the *Bank of Australasia* for £221.

In October, 1874, *Hodgson* purchased pale ale to the amount of £348 from Messrs. *Saunders & Cameron*, and he, in like manner, shipped the ale to *Australia*, and pledged the bills of lading to the *Bank of Australasia* for £306. In November, 1874, and January, 1875, *Hodgson* also purchased goods of smaller amount from other

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firms, which he shipped to *Australia* in like manner, and obtained advances on the bills of lading. All these purchases were paid for by acceptances of the firm, which were dishonoured at maturity. The bankrupt stated in his examination that he could give no explanation as to what became of the money which he obtained by these advances.

Under these circumstances the trustee in the bankruptcy made a report to the Court that, in his opinion, the bankrupt *Hodgson* had been guilty of offences under the 11th section of the *Debtors Act*, 1869, namely, under sub-sections 14 and 15 thereof (1); and then applied to the Court under sect. 16 for an order for the prosecution of the bankrupt *Hodgson*. The Registrar refused the application, and it was now renewed before the Court of Appeal.

Winslow, Q.C. (*Brough* with him), in support of the application:—

The bankrupt has committed an offence within both the 14th and 15th sub-sections of the 11th section. He knew that he was insolvent at the time of purchasing the goods, and his course of proceeding in purchasing them upon credit and immediately pledging them was not the ordinary course of fair business. The fact that he is unable to account for the application of the money which he thus raised is an evidence of fraud. If he has not committed an offence within the 14th and 15th sub-sections, he certainly

(1) 32 & 33 Vict. c. 62: The 11th section provides that a bankrupt or liquidating debtor shall be deemed guilty of a misdemeanour and be liable to imprisonment in (among others) the following cases:—

Sub-sect. 13: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same."

Sub-sect. 14: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being

a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud."

Sub-sect. 15: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud."

has within the 13th, where the obtaining of property within four months of bankruptcy by any kind of fraud is made punishable.

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JAMES, L.J. :—

I am of opinion that the Registrar was quite right in refusing this application. There is abundant evidence of fraud of some kind, which may perhaps be the subject of other proceedings, statutory or otherwise, but the question is whether there is evidence of the particular offences mentioned in the sub-sections on which the application is based—whether there is any evidence that these goods were obtained or disposed of otherwise than in the ordinary course of business. In my opinion they were dealt with in the most ordinary course of business. It was simply a case of buying goods on credit for shipment to *Australia*, and raising money on the bills of lading. The mode in which *Hodgson* applied the money which he obtained cannot make any difference. If he had applied it in paying other debts no complaint would have been made, and the fact that he did not so apply it cannot bring the case within these clauses of the Act. The Court would not be justified in granting an application under these particular clauses, merely on the ground that there appeared to be evidence of some other misconduct not mentioned in them.

242.790

MELLISH, L.J. :—

I am of the same opinion. I think the Court would not be warranted in allowing the trustee to prosecute the bankrupt at the expense of the country, unless it can clearly see that if the charge is proved it will be a legal offence within the statute. In my opinion, in order to bring the bankrupt within these sub-sections, the evidence must shew that he dealt with the goods otherwise than in the ordinary course of business. If this application were to succeed, the consequence would be that every insolvent trader who purchased goods without expecting to be able to pay for them would be within the provision. This could not have been intended by the Legislature. The thing aimed at was the obtaining of goods on credit, and then immediately selling them at a loss; that is not the ordinary course of business. But here the

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trader only bought goods on credit, and raised money on them when he exported them, by pledging the bills of lading, which is the ordinary course pursued by export merchants. It is clearly not within the 14th and 15th sub-sections. I had more doubt whether it did not come within the 13th sub-section, but on consideration I think it does not. To satisfy the words of that sub-section, I think there must be some active fraud on the part of the bankrupt similar to the making of a false representation, not simply the purchase of goods when he knows that he is not able to pay for them.

BAGGALLAY, J.A.:—

I am of the same opinion. The case is the same in principle as *Ex parte Stallard* (1), where the Lord Chancellor (Lord Cairns) says: "I think that no criminal prosecution ought to be directed on the ground of mere suspicion; but if there be reasonable evidence of the guilt of the bankrupt, I think that, if no private prosecution is pending, the Court ought to direct proceedings to be taken, and that it is not the duty of the Court to decide whether that evidence will be sufficient to convince a jury that the bankrupt is guilty." In that case a prosecution was directed because there had been false representations on the part of the bankrupt, and he had bought goods on credit and sold them immediately at a heavy loss. In the present case there is no evidence of false representation to the vendors, although it is a case of very grave suspicion.

Solicitors: *Crook & Smith.*

(1) Law Rep. 3 Ch. 408, 410.

GARBUTT *v.* FAWCUS.

[1875 G. 10.]

*Judicature Acts—Stay of Proceedings—Action—Equitable Defence—36 & 37
 Vict. c. 66, s. 24, sub-s. 5.*

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Dec. 1.

A Defendant in an action at law having an equitable defence should obtain from the Judge of the Common Law Division leave to plead that defence, and cannot obtain from a Judge of the Chancery Division a direction to stay proceedings in the Common Law Division: and this prevails whether the action at law was commenced before or after the Judicature Acts came into operation.

An action pending in one Division will not be stayed by another Division or Judge unless the defence is on grounds unconnected with the cause of action.

Order of *Malins*, V.C., affirmed.

IN this case an action on a promissory note for £900 had been commenced in the Court of Queen's Bench before the 1st of November, 1875, by *R. Fawcus* against *J. H. Garbutt*. On the 13th of November *Garbutt* caused a writ in the Chancery Division to be issued against *Fawcus*, claiming specific performance of an agreement by *Fawcus* not to enforce any claim against *Garbutt* in respect of certain securities or obligations of *Garbutt* held by *Fawcus*, and claiming a stay of proceedings in the action of *Fawcus v. Garbutt*.

Garbutt then moved before Vice-Chancellor *Malins* for directions to stay proceedings in *Fawcus v. Garbutt*. The Vice-Chancellor *Malins* refused to stay the proceedings, and ordered *Garbutt* to pay the costs of the application. //

Garbutt appealed.

Glasse, Q.C., and *Crossley* (*Bohn* with them), for the Appellant:—

The action at law was commenced before the new system came into operation, so that we cannot make our defence at law, and must have judgment against us. As a Judge of the High Court, the Vice-Chancellor *Malins* had power to stay these proceedings.

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 11 C/D. 31
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C. A. The 5th sub-section of sect. 24 of the Act 36 & 37 Vict. c. 66,
 1875 says that a stay of proceedings can be granted, and that must
 mean proceedings in another Court.

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[MELLISH, L.J.:—If you wanted a stay of proceedings in any Court you must go to the Judge of that Court. If you had wanted to stay proceedings before one Vice-Chancellor you would not have applied to another Vice-Chancellor for an injunction.]

All the Courts are now melted into one, and we have applied to the High Court of Justice to stay proceedings, as it has power to do. If the Act meant that the application to stay was to be made to the Division in which the action was, why did it not say so? There is nothing in the Act directing us to raise our defence in the same Division only.

J. Beaumont, for the Defendant, was not called upon.

JAMES, L.J. :—

This appears to me to be a very bold application, asking us, in fact, entirely to repeal the Judicature Acts.

The application is really founded on a bill in Chancery for an injunction filed after the Act passed for the purpose of abolishing injunctions restraining proceedings before another Court has come into operation, the very thing which the Act says shall not be done. The application is for an injunction, and nothing but an injunction, and is wholly against both the letter and the spirit of the Act of Parliament; nor do I see how, by refusing it, any injustice can be done. An action is pending in the Queen's Bench Division, to which action the Plaintiff here has, as he thinks, a good equitable defence under an agreement that he shall not be sued. He has, therefore, a right to apply to a Judge of the Queen's Bench Division for leave to make an equitable defence, or set up a counter-claim. No doubt, if justice requires this leave to be given, the Judge of that Division would give such leave. The action has been brought in that Division, and in that Division it ought to remain, subject to any proceedings being taken under the 11th section of the Act of 1875.

MELLISH, L.J.:—

I am of the same opinion. This is an application for either an injunction or a stay of proceedings in the Queen's Bench Division, and the Vice-Chancellor *Malins* has refused the application. The question is whether, since the Judicature Acts have come into operation, what is in fact an injunction bill in equity can be filed, and proceedings in the Queen's Bench Division can thus be stayed.

It appears to me, in the first place, that the 5th sub-section of the 24th section of the *Judicature Act*, 1873, has in the plainest terms taken away the right of the Chancery Division to grant any such injunction. It is quite clear that the subject-matter of this application is one which is capable of being pleaded by way of defence in the Common Law Division, and if the action had been brought after the Judicature Acts came into operation, there could be no question about it. The action was, however, brought before that time, but that makes no difference in this case. By sect. 22, power is given to the Court or a Judge in Chambers to order that the action shall be continued and concluded according to the ordinary course of the High Court of Justice. That section has been frequently acted upon, and wherever there has appeared to be a good equitable defence, the action has been allowed to proceed under the new procedure.

It was objected that this was only a matter of discretion, whereas before the Act it was a matter of right to have the injunction, and that right having been taken away, it must follow that a party must, *ex debito justitiæ*, be allowed to raise an equitable defence. But the right remains as before. Before the Act, this injunction would not have been granted as a matter of course, but must have been made on affidavits shewing a *prima facie* case, and a case of the same sort must be made before the Common Law Judge, in order to get leave to plead the same matter as an equitable defence. If leave were refused, the Court of Appeal has the same power of saying whether it was fit that the defence should be pleaded, as the Court of Appeal in Chancery had to say whether it was a case for an injunction.

It is then said that it is not an injunction which is asked for,

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but a stay of proceedings. That, however, is even a stronger thing; because an injunction affected only the parties, but a stay of proceedings affects the Court itself. This, however, is not a case for any stay of proceedings, but is clearly a case for an equitable defence. Proceedings will be stayed only when the whole action ought to come to an end, as in the case of actions brought against a company after a winding-up order has been made.

Here the defence might fail, and the Plaintiff at law might succeed; but if proceedings in the Common Law action were stayed, and the action in Chancery was carried on and failed, the Plaintiff at law would have no means of recovering, except, perhaps, by the circuitous course of pleading his case before the Chancery Division as a counter-claim.

The Plaintiff here ought to have applied to the Judge of the Queen's Bench Division for leave to plead his equitable defence.

BAGGALLAY, J.A.:—

I am of the same opinion. This application is made in an action commenced after the Judicature Acts came into operation, and is to stay proceedings in an action commenced before that time. By the 22nd section of the Judicature Acts, 1873, that action is to be continued and concluded in the High Court of Justice. We have, then, a cause commenced in the Court of Queen's Bench and now pending in the High Court of Justice. Then by sect. 24, sub-s. 5, of the *Judicature Act*, 1873, it is provided that no cause or proceeding at any time pending in the High Court of Justice shall be restrained by injunction, and it is clear that no injustice can be done, because by the same sub-section power is reserved to the Court to stay proceedings; and from both Acts, especially from sect. 11 of the Act of 1875, it is clear that every such application must be made to the Division of the High Court in which the proceedings are pending. The decision of the Vice-Chancellor is, in my opinion, quite right.

BRAMWELL, B.:—

Let us consider how this question would have stood if both

actions had been commenced after the Judicature Acts came into operation. If this application then succeeded, it is clear that one of the main objects of the Acts would have been frustrated, because it was of the essence of the Acts that there should be but one suit between the parties. It is certain that if this application had been made before the commencement of the Judicature Acts, it would have been an application for an injunction—a thing which is now by the Act expressly prohibited. Then it is said, oddly enough, that though the right to an injunction has been taken away, a right of a very similar nature has been given; but that cannot have been the object of the 5th sub-section. That provision is directed to a different case, and gives power to stay proceedings upon some ground which was not the subject of the suit or counter-claim, as, for instance, a winding-up order having been made.

It seems very clear that according to the meaning of this Act of Parliament, if both actions had been brought after the Acts came into operation, this application would not have been granted.

Then, does it make any difference that one action was brought before the commencement of the Acts? Possibly, if the Judge refused to allow this equitable defence to be pleaded (though I cannot understand how such a thing could happen), then, in order to do complete justice, the applicant not being able to avail himself of his rights by counter-claim, a stay of proceedings might be granted. But that would be entirely a matter of discretion for the Chancery Division, and would depend upon the nature of the effort made to set up the counter-claim. Here no such effort has been made, and no stay of proceedings can be granted.

Solicitor for Appellant: *O. B. Wooler.*

Solicitors for Respondent: *Stibbard & Cronshey.*

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ETHERINGTON *v.* WILSON.

[1875 E. 36.]

Charity — Election to Christ's Hospital — Qualification of Candidate — Words—" Parishioner"—Bona fides.

Under a charity scheme, sanctioned by the Court, by which a parish was empowered to elect children for *Christ's Hospital*, it was provided that no child should be eligible unless born in the parish, or unless his parents or one of them should be or should have been parishioners or a parishioner of the parish :—

Held (reversing the decision of *Malins*, V.C.), that the word "parishioner" must be taken in its ordinary sense of a person occupying premises which are liable to be rated in the parish. Therefore, where a man took a house temporarily, before the election, for the purpose of obtaining a qualification for his son, for which he paid rent and rates, and his son was elected by the parishioners, it was held that the qualification was good and the election valid.

Observation on the expression "a *bonâ fide* parishioner."

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

By indenture dated the 18th and 19th of November, 1720, *John West* and *Frances* his wife, conveyed certain hereditaments to the Corporation of *London*, Governors of *Christ's Hospital*, upon trust, among other things, for the education of poor children born within the parish of *Twickenham* and the adjoining parishes, at *Christ's Hospital*, with a preference to the next of kin of *John* and *Frances West* (if poor), such children to be chosen by the minister, churchwardens, and parishioners of each parish in vestry assembled.

In the year 1868, a scheme was settled by the Court of Chancery, regulating the manner of choosing the children and proving their consanguinity to the founders. By that scheme it was directed that the claims of children to be admitted to *Christ's Hospital*, should be determined by the minister, churchwardens, and parishioners of the parish whose turn it was to present, in vestry assembled. That in the event of two or more children claiming on one and the same occasion to be so admitted, the election should be determined by the majority of votes of the vestry taken

(1) Law Rep. 20 Eq. 606.

4 P.D. 51.

according to the Acts or Act for the regulation of Vestries for the time being in force in that particular parish ; and in such election regard should be had to the circumstances of the candidates, but not so as to make it obligatory on the electors to choose the poorer of two candidates, both of whom were, in their judgment, poor. That no child should be considered eligible to partake of the benefit of this charity unless he or she should be born in, or unless his or her parents or one of them should be or should have been parishioners or a parishioner of, the parish for the time being exercising the right to elect or present, or in the event of there not being any candidate for election and presentation within such parish, then unless he or she or his parents or one of them, should be or should have been parishioners or a parishioner of a parish contiguous to or adjoining the parish whose turn it was to elect and present, nor unless such child should comply with and fulfil the general regulation for the time being in force for the regulation of the admission of children to *Christ's Hospital*.

The Plaintiff, *E. D. Etherington*, was born in the parish of *Richmond*, and was of kin to the founders of the charity. His father, *J. W. Etherington*, was a music-seller, resident at *Richmond*, but in the year 1873 he set up a branch place of business in *Twickenham*, and in 1874 had obtained the election of one of his sons, a brother of the present Plaintiff, into *Christ's Hospital* under the *West* Charity, his qualification for which had been allowed in a suit of *Etherington v. Limpus* (1874 E. 70) brought in the name of the child against the vicar and churchwardens of *Twickenham* and the Governors of *Christ's Hospital*. This suit was settled on the terms of the child being admitted to *Christ's Hospital*, and the vicar and churchwardens paying the costs of the suit.

The Defendant, *Henry Arthur Wilson*, was also a candidate for election on the Charity, and was of kin to the founders. He was born in the parish of *St. John's, Westminster*, and his father *Henry Wilson*, was a tailor's foreman, resident in that parish. In the month of November, 1874, *Wilson* called upon Mr. *Lane*, the vestry clerk, and requested him to ascertain whether there was a house in *Twickenham* which he could rent for the purpose of becoming a parishioner. Mr. *Lane* shortly afterwards informed

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C. A. him that there was a house in *Back Lane, Twickenham*, which
 1875 had been unoccupied for some time, which he might rent at £18
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 ETHERINGTON per annum, and on or about the 18th of November, Mr. *Lane*,  
 v. under *Wilson's* instructions, entered into an agreement with Mr.  
 WILSON. *Stroud*, the owner of the house, by which *Wilson* became the  
 ——— tenant for a term of three months certain, at a rent of 30s. a  
 month, the tenancy after that time, if continued, to be deter-  
 minable at one month's notice on either side; and Mr. *Lane* paid  
 the landlord one month's rent in advance. On the same day,  
*Wilson* called on Mr. *Stroud*, and received from him the key of  
 the house, of which he forthwith took possession. Having thus  
 obtained qualification for his son, *Wilson* gave notice to the vicar  
 and churchwardens of his intention to propose his son as a candi-  
 date for *Christ's Hospital* under *West's Charity*.

It also appeared that he placed a bed and some other articles of  
 furniture in the house, and that after the election, but not before,  
 he occasionally slept in the house, but did not otherwise occupy  
 it. About the same time he also required Mr. *Lane* to place his  
 name on the ratepayers' book as a parishioner of *Twickenham*, and  
 Mr. *Lane* wrote his name in the book in pencil, and received from  
 him the sum of 17s. 6d. in respect of the rates, although they had  
 not been demanded of him. Mr. *Lane* subsequently entered his  
 name fully in the ratebook as a parishioner.

On the 31st of December, 1874, a meeting of the vestry was  
 held for the purpose of electing a child into *Christ's Hospital*, at  
 which two candidates, namely, the Plaintiff *E. D. Etherington* and  
 the Defendant *H. A. Wilson* were proposed. After some discussion  
 as to *Wilson's* qualification, a show of hands was taken, and pro-  
 nounced by the vicar, the Rev. *H. F. Limpus*, to be in favour of  
*Wilson*. A poll was demanded on behalf of the Plaintiff, and  
 held on the 7th of January, 1875, when, after a protest by the  
 Plaintiff's father, on the ground that *Wilson's* father was not pro-  
 perly qualified as a parishioner, *Wilson* was elected by 233 votes  
 against 177 given to the Plaintiff.

The present bill was filed (with the consent of the Charity Com-  
 missioners) for the purpose of obtaining a declaration that the  
 election of the Defendant *Wilson* was void, and that the election  
 ought to enure for the benefit of the Plaintiff, and for an injunction

tion restraining the Governors of *Christ's Hospital* from admitting any child under the *West* Charity except the Plaintiff.

The Vice-Chancellor made a decree declaring that the Defendant *H. A. Wilson* was not eligible to participate in the benefits of the charity, that his election was void, that the Plaintiff was duly elected, and that the vicar and churchwardens of *Twickenham* should pay the costs of the suit.

From this decision the vicar and churchwardens appealed.

*J. Pearson*, Q.C., and *W. Phillimore*, for the Appellants:—

*Wilson* was a parishioner in the legal sense of that term: *Attorney-General v. Parker* (1); *Jeffery's Case* (2); *Prideaux's Churchwarden's Guide* (3); 58 Geo. 3, c. 69, s. 3; 59 Geo. 3, c. 85, s. 1. The Vice-Chancellor did not dispute this, but imported the condition that a person for this purpose must be not only a parishioner, but what his Lordship called a *bonâ fide* parishioner. The words of the scheme ought to be taken as they stand, and then the parishioners know what they are about; but no one can tell what a judge will consider to constitute a *bonâ fide* parishioner.

The word "parishioner" is used in its ordinary sense in those clauses of the scheme which regulate the mode of election, and there is no reason for reading it in a different sense when it speaks of the qualification.

If the Court should hold that *Wilson* was not qualified, there ought to be a re-election upon the authority of *Reg. v. Mayor of Tewkesbury* (4), where it was held that the mere knowledge on the part of the electors who voted for an unqualified candidate that he was not qualified in fact, did not amount to a knowledge that he was disqualified in point of law, and therefore their votes were not thrown away.

The decree is clearly wrong in making the vicar and churchwardens pay the costs of the suit. They did nothing but return the candidate who had the most votes.

*Glasse*, Q.C., and *Rawlins*, for the Plaintiff:—

Forty days' residence in the parish is requisite before a person

(1) 3 Atk. 576.

(2) 5 Rep. 66 b.

(3) 11th Ed. p. 154.

(4) Law Rep. 3 Q. B. 629.

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can be deemed a parishioner; for before that time he has not acquired a settlement: *Tomlin's Law Dictionary*, "Parishioner." If paying rates constitutes a parishioner, that requisite was wanting when the boy was put in nomination. At that time, *Wilson*, the father, could not have voted at the meeting under the Acts by which vestries are regulated. The real question, however, is whether the qualification of *Wilson* was a *bonâ fide* qualification. We say that it was only colourable. Considering the object of the scheme, being that of a local charity, it is clear that a mere non-resident occupation is not intended. The *Public Worship Regulation Act* (37 & 38 Vict. c. 85) describes a parishioner as a person who has for one year had his usual place of abode in the parish. In the present case there ought to have been a reasonable period of residence.

If the election of the Defendant was void all the votes in his favour were thrown away, and the Plaintiff was actually elected: *Gosling v. Veley* (1); *Tipperary Election Case* (2).

*Simmonds*, for the Defendant *Wilson*.

*Freeling*, for the Governors of *Christ's Hospital*.

JAMES, L.J. :—

I am unable at all to concur in the judgment and decision of the Vice-Chancellor in this case.

There is a certain charity regulated by a scheme of this Court, and according to that scheme the parish of *Twickenham*, that is to say, the "minister, churchwardens, and parishioners of the parish, in vestry assembled," have a right to present for admission to *Christ's Hospital* a child of a certain lineage, being the child of a father or mother who is or has been a parishioner of the parish of *Twickenham*, the qualification of course being intended for the benefit of the parish of *Twickenham*. There was a child, the Defendant *Wilson*, who was of the prescribed lineage, and whose father was minded to complete the qualification for his child by making himself a parishioner of the parish of *Twickenham*, as he knew that the turn of that parish to present a child was very soon

(1) 7 Q. B. 406.

(2) Ir. Rep. 9 C. L. 217.

coming. He being minded to acquire this qualification, proceeds to find out a vacant house in *Twickenham*. He goes to the landlord of that house, and bargains with him to take the house for three months, and thenceforward from month to month. It is not pretended that the landlord of the house had any object whatever but to find a tenant for the house, and to get rent for it.

*Wilson* enters into a valid binding contract to take the house and to pay the rent, and having done that, by way of further securing his qualification, he causes his name to be entered on the rate-book of the parish, and pays a portion of the rate which was then current. That being so, he was, as it appears to me, in point of law a parishioner, and in point of law he had acquired the qualification which was prescribed by the scheme. The child thereupon does obtain from the minister, churchwardens, and parishioners in vestry assembled, the majority of the votes of the electors, and was thereupon by the vicar and churchwardens presented or nominated to the proper authorities of *Christ's Hospital*; upon which this bill was filed.

Now the Vice-Chancellor was of opinion that that election ought to be set aside; that the child was to be deprived of the benefit which he had received from the electors of the parish of *Twickenham*, and he declared that another boy who had not obtained the majority ought to have been declared duly elected, and was entitled to the benefit of the charity. The Vice-Chancellor does not appear to have denied that in point of law and for every other purpose whatever, either at Common Law or under any Act of Parliament, this gentleman was a parishioner of the parish of *Twickenham*; but admitting that he was a parishioner under an Act of Parliament or under the Common Law, he came to the conclusion that he was not a parishioner within the meaning of this scheme. Now I am not aware that there is any different interpretation of the word "parishioner" in this scheme from what it would have in any legal document. The Vice-Chancellor proceeded upon the ground that *Wilson* was not a *bonâ fide* householder and parishioner, that his qualification as a parishioner was colourable. Now I cannot help thinking that the fallacy of the judgment arose from the use of that word "colourable" and the

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use of the words "*bonâ fide*." Of course, if the man never did become the occupier—if the man never did enter into a contract for taking, and never did take the house, but only got somebody to put up his name over the door or something of that kind, then it would have been colourable, and it would have been a sham. In that case he never would have been a parishioner, but if he was really a parishioner in point of law then the thing is not colourable, is not fictitious, is not *malâ fide*. The meaning of the words "*bonâ fide*" and "colourable" in the Vice-Chancellor's judgment appears to me to be this—that a man under this scheme is not entitled to be considered qualified for it if he expressly and avowedly obtains the qualification for that purpose, and for that purpose only, without any other intention of establishing a permanent connection with the parish. I am of opinion that no Court of Law or Equity has a right to attach any such condition or modification of the qualification. If the law enables a man to be qualified he is qualified, and if it is intended to put any restriction upon that qualification, that restriction must be put by special enactment or by special provision in the scheme or other document. Of course, it is familiar to us all that men constantly acquire qualifications for voting in counties. A man buys a 40s. freehold for the sole purpose—the undisguised purpose—of giving himself a vote in a county with which he has not and does not mean to have any other connection whatever. I may put a great number of other cases in which the law has prescribed qualifications. A man has a right to give himself, if he can, a qualification. If he does so, then he is qualified, and there is no equity to deprive a man of that qualification which the law entitles him to get. I am of opinion, therefore, that the Vice-Chancellor's declaration and decision were wrong in this case.

I must also say that I read with some surprise the order upon the vicar and churchwardens to pay the costs of the proceedings. The vicar and churchwardens are merely made parties in their representative character, as being the three parishioners who were best fitted to represent the whole body of parishioners who had interest in this scheme. They seem to have done nothing whatever beyond presiding at this election, and returning the result of

it. And in fact the bill prays no relief against them. If this had been an appeal merely for costs by these gentlemen, it is one of those cases in which the appeal would have been entertained.

I am therefore of opinion that the decree of the Vice-Chancellor must be reversed, and that, in lieu thereof, the bill of the Plaintiff must be dismissed with costs as against the next friend.

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MELLISH, L.J.:—

I am of the same opinion. The only question to be determined is whether *Henry Wilson*, the father of the boy *Henry Arthur Wilson*, was on the day of the election, namely, the 31st of December, 1874, a parishioner of the parish of *Twickenham*. Now, I am of opinion that in interpreting this scheme we must interpret the meaning of the word “parishioner” in this scheme just as we should interpret it in any other legal document or Act of Parliament or deed constituting a charity, and so interpreting it I see no reason why we should not put the same construction on the word “parishioner” as was given to it by Lord *Hardwicke* in *Attorney-General v. Parker* (1), where he says, “Parishioner is a very large word, and takes in, not only inhabitants of the parish, but persons who are occupiers of lands, that pay the several rates and duties, tho’ they are not resiant nor do contribute to the ornaments of the church.” Therefore, according to that definition, the question is: Was *Henry Wilson*, on the 31st of December, the occupier of property in respect of which he was bound “to pay the several rates and duties?” I agree with the argument of Mr. *Pearson*, that if there was any doubt as to what was the proper sense to be put on the word “parishioner” in the clause in question it would be a strong ground for giving it the interpretation he contends for, that in the first and second clauses of the scheme “parishioner” is unquestionably used in that sense.

Then the question is, was Mr. *Wilson*, on the 31st of December, the occupier of property which was liable to be rated? The evidence is not contradicted that he had made an agreement with *Stroud*, the landlord, to take a house for a period of three months, and then afterwards from month to month, paying a

(1) 3 Atk. 577.

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certain rent. Then is there any reason to say that that was not really done? I agree that even although a nominal agreement, or perhaps a formal deed, had been made making such a lease, yet if it had been proved that there was a real secret understanding between *Stroud* and *Wilson* that he should not occupy the premises, and that he should not pay any rent, or that if he went in he should go out whenever he was told to go out, and that this was a scheme merely adopted to make him appear to be an occupier when he was not an occupier, he would not, in such a case, have acquired a qualification. There are authorities respecting the qualifications of members of Parliament where there is a secret trust that the candidate does not really become the owner, and that would prevent him having the qualification; but I cannot see the slightest reason for supposing that *Stroud* was looking to anything except to get his rent, and *Wilson* was trying to get a house which there might very likely have been great difficulty in letting, and *Stroud* was glad to get rent for three or four months if in any way he could get it. He knew very little about *Wilson*, and might have thought *Wilson* was not a very responsible person, but he was introduced to him by a person in whom he had confidence, and who told him the rent would be paid; he believed the rent would be paid, and if the rent was paid, I do not suppose he cared whether *Wilson* paid it out of his own money or any one else's. Therefore he made a bargain which seems to be a bargain fairly and really made. He gives him the key, and *Wilson* enters formally into possession. He then puts some furniture in, and comes occasionally day by day. Now I am not aware of any authority for holding that a person who does that does not become the occupier of the premises so as to be subject to be rated. There may be cases where the landlord, not being able to get a tenant, may be free from the rates because his house is unoccupied, but if a person takes the lease of a house for the express purpose of becoming the occupier, and takes the key and goes in, I apprehend such person is the occupier, and is liable to be rated. The question whether he is actually rated or not is immaterial; but so far the fact of his being rated confirms the evidence that he was the occupier. That is evidence against him that he was the occupier.

I am of opinion, therefore, he had the qualification, and if he did have the qualification, it appears to me that we really cannot enter into any further question about it, but must declare that the election of the son was good.

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BAGGALLAY, J.A. :—

I am of the same opinion.

BRAMWELL, B. :—

I am also of the same opinion. It is clear to my mind that the qualification in this case was not colourable. That is a word that is properly used where, if the true state of things were known, a certain colour would appear, but where both parties had agreed that the true state of things should not be known, and that a different colour should be given to them. That is not the case here. I make no doubt that this man was liable for the rent; there is no pretence for saying that *Stroud* meant that he should occupy without paying rent for it, or that the premises should continue empty until such time as the election took place. Although *Wilson's* object was to get a qualification for his son, it seems to me *Stroud's* object was to get some rent for the premises. There is nothing colourable in it—it is the truth. *Wilson* has a right to occupy, and he occupies so much as he thinks fit to occupy—he is subject to be rated, and is rated, and pays rates. The result is that he has all the rights and is subject to all the duties of a parishioner, except in so far as there may be any statute applicable to this case which might deprive him of that right of voting or might not. But what then? The statute referred to—the *Public Worship Regulation Act*—does not unmake a man a parishioner—as it were—but says that although he is a parishioner he shall not have a particular right. It appears to me the statute would rather go to shew that a man in the situation of *Wilson* was a parishioner than that he was not. It is clear to my mind that this man was in some sense a parishioner, and I should say a parishioner in every sense he could be. But it is said of him that he is not a *bonâ fide* parishioner. I should think any person would have a difficulty in defining the difference between a



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“parishioner” and a “*bonâ fide* parishioner.” I do not know what difference there is between them. The matter may be tested in this way: Suppose, with a view only to one of these elections, a man had taken the premises ten years ago, and had occupied and paid rent and rates for them, I suppose he would have been a *bonâ fide* parishioner beyond all doubt; and certainly it would have been so if his occupation had been such as that of Mr. *Etherington* in this case, who, I believe it is admitted, took the premises which he occupies with a view to get a qualification for his son. Therefore the mere fact of the man occupying a house to get a qualification would not prevent his being a *bonâ fide* parishioner. Now, suppose, instead of that being the case, *Wilson* had taken these premises without a view to the election, but that the windfall had happened a month after he had taken them, I suppose then there would be no doubt that he would be a *bonâ fide* parishioner. Therefore, it seems to me, he was a *bonâ fide* parishioner although his occupation was short, and although his object in taking the premises was to qualify his son. Can the combination of these two things prevent his being a *bonâ fide* parishioner? Certainly not. It seems to me, therefore, that it is almost a matter of demonstration that this man is a parishioner, and, as far as one can attribute any meaning to the expression, is not otherwise than a *bonâ fide* parishioner. It seems to me, therefore, he had the requisite qualification, and that his son was duly elected.

Solicitors for Appellants: *Wright & Pilley.*

Solicitor for Plaintiff: *Montagu Scott.*

Solicitor for Defendant *Wilson*: *R. Hewlett.*

Solicitors for *Christ's Hospital*: *Beachcroft & Thompson.*

## REPUBLIC OF COSTA RICA v. ERLANGER.

[1874 C. 113.]

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*Cross Bill—Corporation—Discovery—Staying Proceedings.*

An original bill was filed by a foreign Republic, and a cross bill was filed by one of the Defendants against the Republic and one of its officers, made a Defendant for the purpose of discovery:—

*Held* (reversing the decision of *Malins*, V.C.), that the Court would not order proceedings in the original suit to be stayed until the officer of the Republic had appeared.

*Semble*, that the suit might be stayed until the Republic had named a proper person to give discovery.

*Semble*, that the rule is the same in the case of a Corporation.

A BILL had been filed by the Republic of *Costa Rica* against *Emile Erlanger* and others. The Defendant *Erlanger* filed a cross bill against the Republic of *Costa Rica* and the President of the Republic, making the President a Defendant for the purpose of discovery. The causes were proceeding under the old practice.

*Erlanger* then gave notice of motion before the Vice-Chancellor *Malins* that proceedings in the original suit might be stayed until the Defendants in the second suit had appeared and answered. The Republic then appeared. The Vice-Chancellor *Malins* made an order on the motion that the proceedings in the original suit should be stayed until appearances should be entered by the Defendants in the cross suit. *(4/)*

The Republic of *Costa Rica* appealed.

*Glasse*, Q.C., and *Locock Webb*, Q.C. (*Higgins*, Q.C., with them), for the Appellants, referred to *United States of America v. Wagner* (1); *Republic of Peru v. Weguelin* (2); *Prieoleau v. United States* (3).

*Cotton*, Q.C., and *Fry*, Q.C. (*Ingle Joyce* with them), for *Erlanger*:—

The Republic is a corporation, and we have a right to select

(1) Law Rep. 2 Ch. 582.

(2) Law Rep. 20 Eq. 140.

(3) Law Rep. 2 Eq. 659.

*(4/Sec WA (11875) 225-1440 109*

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 1875 discovery. It is then the practice to stay proceedings until the  
 REPUBLIC OF the Defendants to the cross bill have appeared and answered. The  
 COSTA RICA cases cited on the other side rather shew that the Plaintiff in  
 v. a suit against a corporation has a right to select a proper  
 ERLANGER. officer of a corporation. If the officer selected happens to know  
 nothing about it, that is the Plaintiff's misfortune.

JAMES, L.J. :—

It appears to me that the order of the Vice-Chancellor has been issued improvidently. There is an original suit by a foreign government against a Defendant claiming some relief as against him—it does not signify what. The Defendant, being sued by the foreign government, has filed, as he properly might do, a cross bill against the foreign government, and has named a person connected with that foreign government, and resident abroad, as a Defendant to that cross bill, for the purpose of discovery. The Vice-Chancellor has thereupon made an order staying the original suit until both the Defendants—the government which was the Plaintiff in the original suit, and the person selected by the Plaintiff in the cross suit—shall have appeared to that cross bill. And now it is said that this case is to follow exactly the analogy of what would be done in suits against corporations in *England*. I have not heard any authority cited, and I should be very much surprised if any authority could be found, that such a thing could be done even with regard to an English corporation, and an officer of that English corporation; that is to say, that the original suit should be stayed until that officer, or person who was named by the Plaintiff in the second suit, has appeared and answered. Of course the person may determine for himself whether he will make discovery or not, but in many cases the corporation might have no power to compel him to do so.

In this Court, with regard to persons in this country, it is open to a Plaintiff in a cross suit to select any person he thinks fit for the purpose of discovery, and if that person is subject to the process of the Court, the Plaintiff can use the process of the Court for the purpose of extracting from the Defendant so selected whatever can

be got from him. But if the Plaintiff chooses to select somebody whom he cannot get to appear or answer, he does not thereby obtain a right to stop indefinitely the suit of the original Plaintiff. He is at liberty to use the process of the Court, and if he can enforce discovery he is at liberty to do so. That is all the Court can do for a Plaintiff in such a position, except that the Court can, for the purpose of doing justice, say to the original Plaintiff, "We will stop your proceedings until you have named some proper person to give the discovery which is sought by the Defendant from you." That is the form of the order which was given at common law, and it is the form of the order given at this Court, and is the form of the order which is prescribed by the Rules under the *Judicature Act*. I believe there is no authority whatever either with regard to an English corporation or Plaintiff, or a foreign corporation or Plaintiff, for staying the proceedings in the suit until a Defendant selected by the Plaintiff in a cross suit has entered an appearance in the cross suit.

I am of opinion that the order of the Vice-Chancellor ought to be discharged so far as it added to the order the name of the President of the Republic of *Costa Rica*. The other part of the order which stayed the proceedings till the Republic has appeared was quite right.

MELLISH, L.J.:—

The Vice-Chancellor's order in this case cannot be supported unless the Defendants in the original suit are entitled as of right to compel the President of the Republic to give discovery and to answer the interrogatories that may be put to him.

I have no doubt that it is the duty of the Court to see that justice is done, and that the proper person is appointed to make the discovery, but in my opinion it would be liable to very great abuse if the Defendant was allowed to select any person he chose to give the discovery. He might select a friend of his own to give discovery, or he might select some person who would in all probability decline to give the discovery, and so he might get rid of the suit altogether.

I quite understand that there may be reasons, political or of

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dignity, which may make the head of a foreign government, whether president or king, unwilling to submit to the process of the Court in giving discovery; and in all probability there is always some inferior officer who knows a great deal more about the matter than the president is likely to know.

It appears to me a very much more rational practice to say that the Republic is bound to produce some person who can give the proper discovery, but the Defendants are not entitled to select whomsoever they choose. I believe there is no authority for saying that they have that right, and in my opinion we ought not to make a precedent to give it.

BLACKBURN, J. :—

I am of the same opinion. I do not think there is any complaint of the cross bill making the President a Defendant if the President chooses to appear upon it. But the complaint here is that the Vice-Chancellor has stayed the proceedings in the original suit till the President does appear.

I do not see any reason why that should be done. I quite agree that where a foreign sovereign sues in this country he should, so far as the thing can be done, be put in the same position as a body corporate. The manner in which a corporation is to appear is provided for in Rules of Court, 1875, Order xxxi., rule 4, adopting pretty nearly the practice of the common law before the Act passed. [His Lordship then read the rule.]

Now where the body corporate suing is within the jurisdiction of this Court, you can possibly make an order upon the corporation that one of their officers shall answer; but of course it would be absurd to make an order upon a corporation to direct an officer to answer who can know nothing about the matter. A discretion would be used in selecting the person who is likely to know and could answer accordingly.

I do not think that upon this point the sovereignty makes any difference when the corporation is out of the jurisdiction. The Court could not enforce an order in any other way than by staying the suit till a proper person had been named, and that I apprehend to have been the state of things in the case of the *Republic of*

*Peru v. Weguelin* (1), where the Vice-Chancellor *Hall* stayed the suit until a foreign sovereign had submitted to do what was right and proper by naming, *bonâ fide* and really and truly, the person who could give the discovery. It would answer all the purposes of justice if what the Vice-Chancellor *Hall* there did were to be adopted here. The Plaintiff may select anybody he chooses, but he is not to say that in this case he will select the President, because the President, for reasons of dignity, as President *Johnson* did, might say, "I will not appear," and then this suit is to be stayed for ever. It seems to me utterly unreasonable. It may be possible that when the application, as suggested, is made at Chambers it may turn out that this particular individual President of the Republic of *Costa Rica* is so completely the right person for discovery that the suit may be stayed till he consents to give the discovery. But all that we know at present is that the Plaintiff has selected him, and for the reasons I have given, which substantially are the same as those given by the Lords Justices, he has no right so to do, and has no right to stay the suit until the President appears.

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JAMES, L.J.:—

The Appellants will have the costs of the appeal, but not the costs in the Court below.

Solicitors for the Republic: *A. C. Edwards & Co.*

Solicitors for *Emile Erlanger*: *Bischoff, Bompas, & Bischoff.*

(1) Law Rep. 20 Eq. 140.

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TRELEVEN *v.* BRAY.

1875

[1875 T. 168.]

Dec. 8.

*Leave to serve—Notice—Judicature Act, 1873, s. 24, sub-s. 3—Rules of Court, 1875, Order XVI., r. 18.*

Where the Plaintiffs and Defendants allege that a suit is occasioned by the conduct of a third party, the Court will give leave that he may be served with notice of the suit, so as to enable the Court to grant relief against him.

THE suit in this case was for specific performance of an agreement to sell, and it was alleged that a trustee for the Defendants refused to concur in the conveyance, and that this occasioned the suit.

An *ex parte* application was made by the Defendants to the Master of the Rolls for leave to serve the trustee with notice of the suit under the *Judicature Act*, 1873, s. 24, sub-s. 3, and Rules of Court, 1875, Order XVI., r. 18. The Master of the Rolls refused to give the leave, on the ground that the trustee would not under the old practice have been a party to the suit, and that the new practice was not intended to extend to a case of this kind, and that the Defendant's course was still as it would have been under the old practice, to bring an independent action against the trustee.

*Morshead* now renewed the application by way of appeal. The Defendants might be made to pay the costs of the suit, and would then seek to recover these costs from the trustee who had occasioned them. They wished, therefore, to give him an opportunity of disputing the question.

THE COURT (*James*, L.J., *Mellish*, L.J., and *Blackburn*, J.) gave leave to serve the notice on proof being produced to the Registrar that the Plaintiffs concurred in the application.

Solicitor: *Cowlard*.

*In re CHIDLEY. In re LENNARD.*

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1875

Nov. 30.

*Jurisdiction—Bankruptcy annulled—Composition—Execution Creditor—Property vesting in Trustee—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 72, 81, 87.*

A trader was adjudicated bankrupt on the petition of a creditor who was, under an execution, in possession of chattels belonging to the trader. Under orders of the Court, the bankruptcy was afterwards annulled, and the property of the debtor was assigned by him to the same person who was trustee in the bankruptcy, on trust to secure payment of a composition which the majority of the creditors had agreed to accept. The execution creditor then threatened to proceed with his execution :—

*Held*, that as the assignment had been made and the composition had been accepted with the approval of the Court, the Court retained jurisdiction over the execution creditor, though the bankruptcy had been annulled :

*Held*, that the chattels were vested in the trustee discharged from the execution, and that the creditor ought to be restrained from proceeding with the execution.

ON the 5th of December, 1854, *H. B. Lennard* and his partner obtained judgment for £1812 against *J. R. Chidley*, a trader, under which judgment the sheriff on that or the following day seized certain chattels of *J. R. Chidley*. On the 11th of December, 1874, *Lennard* presented a petition for adjudication against *Chidley* founded on the same debt, and stating that he held no security. The bankrupt opposed the adjudication, but was on the 5th of March, 1875, adjudicated a bankrupt under this petition, and *John Riches* was appointed trustee, the sheriff's officer still remaining in possession. *Lennard* proved his debt in the bankruptcy. At a meeting of the creditors held on the 27th of July, 1875, it was duly resolved by a sufficient majority that the order of adjudication be annulled forthwith ; that the creditors should, in discharge of their claims, accept a composition of 1s. in the pound ; that such composition should be secured by the covenant of *Chidley*, and by an assignment by him of his property in trust to secure such composition. By orders of the Court of Bankruptcy, made on the 5th of August, 1875, the Court approved of these resolutions, and ordered them to be carried into

2C/D. 427  
3C/D. 490  
2C/D. 408  
8PD. 93.



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effect; and the adjudication was annulled. By an indenture made on the 6th of August, 1875, between *Chidley* of the one part and *Riches* of the other part, after reciting the proceedings in bankruptcy, it was witnessed, that in consideration of the premises, and in pursuance of the said resolutions and of the order of the Court of Bankruptcy, he, the said *J. R. Chidley*, did thereby assign all the book debts, stock-in-trade, and all other the personal property of the said *J. R. Chidley*, or in which he was in any way interested (including the chattels in question), unto the said *J. Riches*, his executors, administrators, or assigns, in trust for the creditors of the said *J. R. Chidley* as therein mentioned. *Chidley* then covenanted to pay the composition; and it was declared that in case *Chidley* should pay the composition as therein mentioned, then *Riches* should hold the property assigned in trust for *Chidley*.

On the 12th of August, 1875, *Lennard* threatened to enforce his judgment; and on the 17th of August the Registrar in bankruptcy made an order restraining him.

Lennard appealed.

Winslow, Q.C., and *R. T. Reid*, for *Lennard*:—

We say, in the first place, that the Court of Bankruptcy has no power, after a bankruptcy has been annulled, to grant an injunction or to determine whether a security held by a creditor is or is not good: *In re Littler* (1). The *Bankruptcy Act*, 1869, s. 72, deals with bankruptcies, not with compositions; nor is this under sect. 126. We say that we are secured creditors. If we were mortgagees, the Court would clearly not have power to interfere.

De Gex, Q.C., and *R. Griffiths*, for the trustee.

JAMES, L.J.:—

It appears to me that under the 28th section the Court of Bankruptcy has full jurisdiction to determine all questions which may arise in such a case as this. It is not necessary to determine what would be done in the case of a composition with creditors

(1) Law Rep. 18 Eq. 249.

not under the Court of Bankruptcy. Here there was a bankruptcy, and though the bankruptcy has been annulled, the composition was made in bankruptcy by an order of the Court, and as part of the scheme approved of by the Court. At the time when the scheme was approved of, these assets were vested in the trustee, and that being so, the Court had those assets under its control as part of the property to be administered for the benefit of the creditors. Then the Court approved of a scheme by which all these assets were to be assigned to a trustee for the benefit of the creditors, and the assets were assigned accordingly. The trustee has, therefore, power to enforce anything which may be necessary for the purposes of the scheme. It appears to me to be within the words of the 72nd section as a question which the Court has to decide for the purpose of making a complete distribution of the property. We need not be alarmed at the prospect of having to decide every question which can arise under a deed of composition.

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Winslow, Q.C., and *R. T. Reid*, then continued :—

We say that we held possession by the sheriff, and that the trustee only took subject to our execution. We are in the same position as mortgagees. The bankruptcy was litigated for months, and an arrangement was made to save expense by which we continued in possession. This is not a bankruptcy but a composition: *Ex parte Jones* (1). Even if we are held to be dispossessed under sect. 87 of the *Bankruptcy Act*, and under the decision in *Ex parte Rayner* (2), our rights arise again now that the assignment has vested the property again in the bankrupt: *Bailey v. Johnson* (3).

De Gex, Q.C., and *R. Griffiths*, for the trustee, were not called upon.

JAMES, L.J. :—

I am of opinion that the order of the Registrar is well warranted. The objection has been rather to the form than to the substance, and (if I may be allowed to say so with respect to what has been

(1) Law Rep. 10 Ch. 663.

(2) Law Rep. 7 Ch. 325.

(3) Law Rep. 7 Ex. 263.

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decided by the Lord Justice *Mellish*), I entirely approve of and adhere to what was said in the case of *Ex parte Jones* (1); that is to say, that a majority of creditors cannot compel a dissentient creditor to give up his securities and accept something else instead.

But in this case we are dealing with something which was done under the authority of the Court. The adjudication was validly made upon a real act of bankruptcy, and could only be annulled by the Court for the general benefit of the creditors, and not by reason of any infirmity in its inception. At the time when the order was made, the property in these goods belonged to the general body of the creditors, and was plainly divisible amongst them in priority to the claim of the execution creditor, the trustee having a right to this property discharged from the security. Then the creditors came to a resolution, which was approved of by the Court, that a composition should be accepted, and the debtor's property assigned to a trustee for the benefit of the creditors as a security for the payment of the composition. That was approved of, and the bankruptcy was annulled accordingly.

In my opinion the effect of this transaction was that this property, which was the creditors', was vested in the new trustee for the benefit of the creditors generally. The assets which were then the property of the creditors were assigned to and continued in the trustee for the purpose of securing payment of the composition.

It appears to me that the estate continued as it was, assets of the creditors freed and discharged from the execution, and that the order of the Registrar is right.

BAGGALLAY, J.A.:—

I am of the same opinion. The creditors having agreed to accept a composition, and the Court of Bankruptcy having approved of a scheme, it appears to me that the Court has in substance said that *Riches* is the person who, under sect. 81, is to take the property, and has said that all the property of

(1) Law Rep. 10 Ch. 663.

the bankrupt should vest in *Riches* for the purpose of this composition.

I think, therefore, that the Registrar was quite right in restraining the proceedings of the execution creditor.

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BRAMWELL, B. :—

I am of the same opinion. If the bankruptcy had gone on, the Appellants would have lost the benefit of their execution, and they ought also to lose it when this composition was entered into for their benefit as well as that of the other creditors. Looking at sect. 81, I doubt if any assignment by the bankrupt was necessary, though it might have been necessary in order to vest some legal estate in the trustee, but that is all. It is manifest that the order of the Court gave the creditors the equitable interest, which could not be subject to the execution creditor. If the property did not re-vest in the bankrupt *cadit quæstio*; if it did, then it was liable to the equitable rights of the creditors, and to an obligation on his part to execute the assignment.

Solicitors for Trustee : *Blachford, Riches, & Co.*

Solicitors for Execution Creditor : *Miller & Gane.*

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Nov. 10, 11;
Dec. 1.*In re* COAL ECONOMISING GAS COMPANY.

GOVER'S CASE.

Companies Act, 1867, s. 38—Promoter—Previous Contract—Omission from Prospectus—Fraud—Remedy—Action—Removal of Name.

M. agreed with the owner of a patent to purchase the patent for £65,000, to be paid partly in cash and partly in the shares of a company to be formed by *M.* Three months afterwards *M.* made an agreement with a trustee for an intended company to sell the patent to the trustee for £125,000, payable partly in cash and partly in shares in the company. Shortly afterwards the company was formed, *M.* being a director. A prospectus was issued which did not mention the first agreement for purchase:—

Held, by *James, L.J.*, and *Bramwell, B.*, that, under the circumstances, *M.* was not, when he made the first agreement with the patentee, a promoter of the company, and that the omission to specify that agreement was not fraudulent, either under the general law or under 30 & 31 Vict. c. 131, s. 38; and that where the omission to specify any agreement renders the prospectus fraudulent under that statute, the shareholder has his remedy against the person making the omission, but cannot therefore have his name removed from the list of shareholders:

Held, by *Mellish, L.J.*, that as *M.*, after he made the first agreement, became a promoter of the company, he ought to have disclosed that agreement to the company; but that the omission did not, under the statute, make the prospectus fraudulent on the part of the company, and that the shareholder therefore could not have his name removed:

Held, by *Brett, J.*, that the omission to disclose the first agreement was not a fraud independently of the statute, but that the omission to disclose a contract formerly made by a promoter, and likely to affect the mind of a subscriber for shares, was fraudulent under the statute; and that the remedy of the shareholder was to have her name removed from the list of shareholders.

Order of *Bacon, V.C.*, affirmed.

ON the 23rd of July, 1873, an agreement was made between *H. Skoines* and *W. S. Mappin*, whereby *Mappin* agreed to buy from *Skoines* a patent for improvements in the manufacture of gas lately obtained by *Skoines*. The price was to be £65,000; £1000 to be paid on the signing of the agreement, £4000 within twenty-one days after the allotment of shares in a company to be formed by *Mappin*, £15,000 in preference shares in the company, and £45,000 in fully paid-up shares in the company. *Mappin* further

agreed to use his best endeavours to form a company for the purpose of acquiring and working the patent, and if he failed the agreement was to become void, *Skoines* retaining the £1000.

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On the 23rd of October, 1873, an agreement was made between *Mappin* and *J. H. Wright*, described as trustee of a company intended to be formed and registered under the name of the *Coal Economising Gas Company*. By this agreement *Mappin* agreed to sell to *Wright Skoines'* patent for £125,000; £7500 in cash, paid within twenty-one days after the allotment of shares and the adoption by the directors of the agreement with *Skoines*; £7500 in cash two months after that; £45,000 in fully paid-up preference shares, and £65,000 in deferred shares.

The company was registered on the 4th of November, 1873, and *Mappin* was appointed a director. A prospectus was issued, in which his name appeared as a director, and in which the capital was stated to be £300,000 in £10 shares; the company was said to be established for the purpose of acquiring and working *Skoines'* patent; the first issue of shares was to be for £165,000 in 16,500 shares of £10 each, of which 4500 were then offered for subscription, the remaining 12,000 shares having been taken in part payment by the vendor. The only agreement mentioned in the prospectus was that between *Mappin* and *Wright*.

In January, 1874, Miss *Gover*, induced, as she alleged, by the statements in the prospectus, applied for ten shares in the company, which were allotted to her.

The company was not prosperous, and calls were made upon Miss *Gover*. She therefore moved to have her name removed from the list of shareholders on the ground that the prospectus did not disclose the agreement between *Skoines* and *Mappin*. After Miss *Gover* had made the application to have her name removed, the company was ordered to be wound up. *Mappin* denied that at the time when he made that agreement he was a promoter of the company. The other material facts are fully stated in the report of this case (1).

The Vice-Chancellor *Bacon* refused to remove Miss *Gover's* name from the list, as reported (2).

(1) Law Rep. 20 Eq. 114.

(2) Law Rep. 20 Eq. 114.

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Jackson, Q.C., and *Ince*, Q.C., for Miss *Gover* :—

The concealment of this contract was a fraud on Miss *Gover* which would always entitle her in this Court to be discharged from her contract to take shares: but the Act of 1867 (1) says that with or without fraud such a contract shall be disclosed. This was not a case of winding up and an attempt to escape. Miss *Gover* applied to be removed whilst the company was going on. The only reason why in *Askew's Case* (2) the Court would not take the name off was that the shares were fully paid up. No doubt the first agreement was made before the company was formed, but it was with a view to the formation of the company, and *Mappin* must be considered as then a promoter. The Act contains no definition of a promoter, and surely a man who enters into a contract to form a company is a promoter. The cases of *Cornell v. Hay* (3) and *Charlton v. Hay* (4) are authorities. *Society for Illustration of Practical Knowledge v. Abbott* (5) is very analogous.

Kay, Q.C., and *Whitehorne*, for the official liquidator :—

It is clear from the section that the only persons within it must hold a fiduciary relation to the company, and that relation *Mappin* certainly did not hold until after the company was formed and he became a director. This section can only refer to such contracts as ought to be disclosed to the shareholders; but this was a contract between *Skoines* and *Mappin* with which the company had nothing to do. It did not signify to *Skoines* what *Mappin* got from the company, nor to the company what he gave to *Skoines*. This

(1) 30 & 31 Vict. c. 131, s. 38 :—

“Every prospectus of a company and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company or otherwise; and any prospectus

or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.”

(2) Law Rep. 9 Ch. 664.

(3) Ibid. 8 C. P. 328.

(4) 31 L. T. (N.S.) 437. 23/11/29

(5) 2 Beav. 559.

particular company was not pointed at, and *Mappin* might have formed another company, or have sold to an existing company, so long as *Skoines* got his shares. If the directors had asked *Mappin* what he gave for the patent, he would not have been bound to tell them. A director may sell his own estate to the company, and is not bound to say what he gave for it. The Act of 1867 does not create any new fraud, and only relates to what shall be evidence of fraud. Before the Act there would have been no fraud in not mentioning this contract. It is not every concealment which entitles a shareholder to escape: *Peek v. Gurney* (1).

Perhaps *Mappin* might not have been able to keep his £60,000: *Imperial Mercantile Credit Association v. Coleman* (2); *Parker v. Lewis* (3); but that is not the question here. If Miss *Gover* can get off, every shareholder can get off; and would it not be monstrous to hold, that directly a company got into debt and difficulties the fact of some absolutely immaterial document not having been stated in the prospectus should enable every shareholder to escape his liabilities to the creditors? This is not the case of fraud by an agent of the company: *Western Bank of Scotland v. Addie* (4). No doubt some suppressions amount to fraud and enable the shareholder to escape, as in *Henderson v. Lacon* (5); but this is not such a case.

This application must be treated as a bill to rectify the register, and could such a bill have succeeded before the statute? *Smith's Case* (6); *Central Railway Company of Venezuela v. Kisch* (7).

Jackson, in reply:—

The company who would take the benefit of the representations made in the prospectus cannot hold the shareholder to the bargain. There is nothing to shew that his remedy is to be merely against the promoter. It is not true that the law remains as before, for the statute has expressly altered the law. It is not true that the property was *Mappin's*, for it was only conditionally his, and the condition was that he should form or promote a company. He

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(1) Law Rep. 6 H. L. 377.

(4) Law Rep. 1 H. L., Sc. 145.

(2) Ibid. 189.

(5) Ibid. 5 Eq. 249, 261.

(3) Ibid. 8 Ch. 1035.

(6) Ibid. 2 Ch. 604.

(7) Law Rep. 2 H. L. 99.

C. A. was a mere conduit-pipe between *Skoines* and the company. If
 1875 the patent was his absolutely the case might be different, but
 GOVER'S CASE. it was never his independently of the company.

Dec. 1. JAMES, L.J. :—

This is an application by a shareholder to have her name removed from the list of shareholders in a joint stock company, on the ground that the prospectus did not contain the date of and the parties to a certain contract between a Mr. *Mappin* and a Mr. *Skoines*.

The legislative enactment on which this application is based is as follows :—[His Lordship then read the 38th section of the Act of 1867.]

The circumstances are briefly these :

Mr. *Skoines* was the patentee of an invention relating to gas lighting. Mr. *Mappin* appears to have thought that it was a thing which he could sell at a very high price to a joint stock company which he might be able to form for the purpose of buying and working the patent.

He thereupon bargains with Mr. *Skoines*, and in consideration of £1000 paid down he obtains from *Skoines* a contract binding the latter, for a certain further price in money and certain paid-up shares in a company to be formed, to convey his patent right. If *Mappin* did not within a certain time succeed in forming the company and obtaining for *Skoines* the further money and the shares, *Skoines* was to be relieved from his obligation, and he would retain the £1000 and the patent.

501-293. At the time when this agreement was made there was no company in existence, and no promoter, trustee, or director; the company had not even an inchoate existence except in the brain of *Mappin*; and the utmost that could be said of *Mappin* was that he was a projector of a company which he intended and had agreed to promote.

Having acquired this equitable right in or to the patent—this dominion over it for his own purpose and benefit—having bought what he did buy of *Skoines* for the lowest price he could

get the latter to accept, with the view to sell it at the highest price which he could get, he did what, it appears to me, he lawfully and rightfully might do—he advertised his wares to the public in the following manner: In substance he says, “I have an article to dispose of; I am willing to allow persons to become partners and shareholders with me on the following terms and conditions.”

He had a right to prescribe his own terms and conditions like any other vendor with any other purchaser. The way in which he made his offer was in the usual way, viz., he entered into a provisional contract with a person on behalf of the intended company. The making of that provisional contract was, in my opinion, the first period of time at which it could be said that the company had even an inchoate existence; and it was from and after the making of that contract that any fiduciary or other relation between *Mappin* and the company began. In the making of that contract, in presenting his own terms and conditions, he was, according to my judgment, in the position of any ordinary vendor with any ordinary purchaser. Everything anterior to that was a matter relating to himself and to his own title as vendor.

It is surely open to any man, in point of law, to sell his property to a joint stock company, and to invite persons to form themselves into a joint stock company to purchase from him, just as it is open to any man to sell to any persons in the world the right to become his partners in any property or undertaking. Until the formation of the partnership he is simply a vendor of the wares; he may ask what price he likes, and obtain what price he can, and he is under no obligation whatever to say what price he gave, or has to give, for them in order to complete his title to the goods.

I really am at a loss to understand on what principles it can be said that *Mappin's* contract with *Skoines* was a contract by the company, or by any promoter, trustee, or director of the company. It is conceded that if he had bought the patent and paid down the price in money, or contracted to pay down the price in money, he would have been under no obligation to disclose his previous bargains or contracts, though he would have been obliged to shew a good title to and to make a good conveyance of the thing which he proposed to sell. And I cannot draw any distinction between a legal right and an equitable right—between a conditional right

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and an absolute right—between a defeasible right and an indefeasible right; all that was still matter of title, and his obligation in any case would have been the same to make a valid conveyance at the proper time of the thing which he undertook to convey.

It is said, however, that when the bargain with *Skoines* is looked at, it contains stipulations about the forming of the company, and the constitution of the company, and the shares of the company. I cannot myself see that the Court has, for this purpose, any right to read those stipulations. They were stipulations between *Mappin* and *Skoines* alone, and obligations as between them. Even if they were stipulations by *Mappin* to do something wrong in the company or to the company, this might be evidence of that wrong, and proper redress might be given for that wrong, as a substantive ground for complaint. But that is, in my judgment, wholly beyond this section; and no impropriety in the contract can make it the contract of the company, or the contract of a promoter, trustee, or director of a company, when at the date of the contract there was no company, no promoter, no trustee, no director. The character of the contract cannot operate as a transformation of the contracting parties.

I may illustrate my view by referring to a contract which, I think, would be within the Act. If, instead of contracting to sell to the company, or inviting the company to become shareholders in the thing itself, *Mappin* had invited them to become shareholders with him in a contract, and they had accepted that invitation, then he would, by the terms of his offer, and by their acceptance of that offer, have made himself their agent as from the date of that contract, and any bye or collateral contract made for his own benefit would be a contract by a trustee for the company or partnership.

I have, for myself, no hesitation in agreeing with the Vice-Chancellor's decision, and in the substance of his judgment.

But there is another view of the Act which appears to me against the applicant. The Act says that an omission shall be deemed fraudulent. It provides that something which under the general law would not be fraudulent shall be deemed fraudulent; and we are dealing with a case of that kind. Where the Legislature provides that something is to be deemed other than it is, we

must be careful to see within what bounds and for what purpose it is to be so deemed. Now the Act does not say that the prospectus shall be deemed fraudulent *simpliciter*, but that it shall be deemed fraudulent on the part of the person wilfully making the omission as against a shareholder having no notice of the matter omitted; and I am of opinion that the true intent and meaning of that provision is to give a personal remedy against the wrongdoer in favour of the shareholder.

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No doubt a company is liable to have its contract with its shareholders rescinded if its prospectus contains false statements, or omissions amounting in effect to false statements, because the prospectus is the basis of that contract. But if the prospectus does not in fact contain any such false statement, or any omission which in fact amounts to such false statement, it seems to me that it would work a grievous wrong and injustice if the company were to be affected thereby.

The vendor, according to the hypothesis, conceals from the company something, and, while so concealing it, stipulates and obtains that he shall be a director, and, as such director, joins in issuing the prospectus. It appears to me that it would require express words or very clear implication to make the company answerable for that conduct beyond what they would be answerable for on the ordinary principles of law and equity. And I think that it is more consonant with justice and common sense to hold that the words "on the part of" mean "as against." On both grounds I am of opinion that the order of the Vice-Chancellor ought to be affirmed.

And on the second point I may add that I myself have not the courage to throw the affairs of I know not what or how many companies into inextricable confusion because somebody discovers that perhaps years previously some one had made an omission, possibly accidental, possibly immaterial, or, as in this case, an omission in which one Vice-Chancellor and one Lord Justice have been unable to detect any legal or moral impropriety.

MELLISH, L.J.:—

I am of opinion that the judgment of the Vice-Chancellor in

C. A. this case ought to be affirmed upon the ground that, even assuming the prospectus ought to be deemed to be fraudulent on the part of *Mappin* as regards the Appellant, still that does not entitle the Appellant to rescind her contract with the company, or to have her name removed from the register.

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I think that the object of the 38th section of the *Companies Act*, 1867, was to prevent the concealment of contracts which it might be material for applicants for shares to know, by making the directors who were parties to such concealment personally responsible to such applicants if they became shareholders, but that it is not enacted that the contract for taking shares should be rescinded on account of such concealment. The question entirely turns on the meaning of the words that the prospectus shall be deemed to be fraudulent on the part of the directors knowingly issuing the same as regards any person taking shares on the faith of such prospectus.

I construe these words to mean simply that, as between the particular director and the shareholders, the prospectus shall be deemed to be fraudulent so as to enable the shareholders to recover in an action against the director for issuing a fraudulent prospectus. It is true, no doubt, as a general rule, that a principal cannot rely on a contract procured by the fraud of his agent; but then this section does not enact that the contract shall be deemed to be fraudulent on the part of the company, and, in my opinion, does not enable the shareholder to rely on the act of the director as being fraudulent, in any action or other proceeding between himself and the company, but only in an action between himself and that director. If the contrary construction were adopted, it would follow that in this very case, if they had made their application in time, the whole of the shareholders of the company, with the exception of *Mappin* and *Skoines*, who, as far as I know, only held fully paid-up shares, might have had their names struck off the register, leaving the creditors to get paid as they could; and, moreover, it would follow that shareholders might escape from their liability on their shares on account of some concealment by a director of a contract which had not done them the slightest harm, and in respect of which they could only recover

nominal damages in an action against the director who had been guilty of the concealment.

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Having come to this conclusion, it is unnecessary that I should give a positive opinion on the question whether *Mappin* was himself a person who ought to be deemed to have issued a fraudulent prospectus within the section.

I think, however, it is right to add that I do not at present agree with the whole of the reasoning of the Lord Justice on this part of the case. If indeed the 38th section could be confined to contracts made by promoters and directors in their character of promoters and directors, or after they had become promoters or directors, the contract between *Skoinies* and *Mappin* would not be within the section, because I agree that there was no fiduciary relation at the time when the contract between *Skoinies* and *Mappin* was made. I think, however, that there are grounds for holding that this would be too narrow a construction, and that the section ought to be held to extend to every contract made with a person who afterwards becomes a promoter or director provided the company have become entitled to the benefit of the contract, or have become liable to perform the provisions of the contract before the prospectus was issued.

If this view is correct, it becomes material to consider whether the company had become entitled to the benefit of the contract made between *Skoinies* and *Mappin*, at the time when the prospectus was issued. Now, I agree that if the contract between *Skoinies* and *Mappin* is to be looked at as an unconditional contract for the sale of the patent from *Skoinies* to *Mappin*, the company had no interest in the contract, and were not entitled to have its contents disclosed to them. The contract, however, between *Skoinies* and *Mappin* was a contract, as it appears to me, upon the condition that *Mappin* should procure the patent to be sold to a company formed for the purpose of working the patent, and if such sale was effected £64,000, partly in money and partly in shares, was to be given to *Skoinies*, and the residue of the price, whether money or shares, was to be retained by *Mappin*. Now, when the company became the purchasers of the patent, that is to say, when the directors, after the formation of the company, adopted the contract made by *Mappin* with *Wright*, *Mappin* was both a promoter

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and director of the company. The purchase of the patent by the company, who were the only company then in existence formed for the working of the patent, enabled him without the knowledge of the company to fulfil his contract with *Skoines*, and to earn an enormous profit. It seems to me that there are grounds for contending that under these circumstances *Mappin* ought not to be considered as the owner of the patent, but only as a person who by a contract with the owner of the patent had the disposal of the patent, and in that case, according to the decision of the House of Lords in the *Imperial Mercantile Credit Association v. Coleman* (1), he was bound to communicate his contract with *Skoines* to the company, and as he did not do so the company were entitled to the benefit of that contract.

BRAMWELL, B.:—

I entirely agree with the Lord Justice *James* both in the conclusions to which he came and in the reasons which he gave for those conclusions, and I doubt if I can usefully add anything to that which he has said; but if I had known that the Lord Justice *Mellish* intended to express a different opinion upon any of the points raised, I should have been prepared with a written judgment.

The case may be tested thus: Suppose *Mappin* had bought this patent to work, and had worked it for ten years. It cannot be contended, is not contended, that in that case it would have been necessary to state his contract of purchase in the prospectus. If not in case he had worked it for ten years, then neither would it be if he worked it for ten months, or ten days, or not at all. Is it then necessary to state it because he did not buy the patent to work but to sell to the company? If so, why? Why does his intention in buying the patent make it necessary or not to state his contract of purchase in the prospectus? There must be some limitation to the words used in the Act. That is conceded. It must be read as a contract entered into by the promoter "as such." Here *Mappin* entered into the contract, not as promoter, but as intending to be so.

(1) Law Rep. 6 H. L. 189.

I think that the Lord Justice *James* is perfectly right on this point, and as to the other points I agree with him. I need, therefore, say nothing further.

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BRETT, J. :—

In this case an application was made under sect. 35 of the *Companies Act*, 1862, by motion on behalf of the Appellant to the Vice-Chancellor, to rectify the register of the *Coal Economising Gas Company* by taking her name off the register, on the ground that it had been entered thereon without sufficient cause. This application the Vice-Chancellor refused.

The facts which seem to me material were, that on the 23rd of July, 1873, one *Mappin* entered into an agreement with one *Skoines*, in which it was stated that *Skoines* agreed to sell to *Mappin*, who agreed to purchase, certain letters patent, &c., for the sum of £65,000, to be paid as follows, viz., £1000 upon the signing of the agreement, £4000 in cash within twenty-one days after an allotment of shares in a company to be formed and registered, &c., by *Mappin* for the purpose of working the said patent should be made; £15,000 in fully paid-up preference shares of the said company bearing interest at £15 per cent.; and £45,000, the balance, in fully paid-up ordinary shares of the said company. Further, that *Mappin* should, with as little delay as possible, use his best endeavours to form a company with a capital not exceeding £150,000, and that, on the formation of such company, *Skoines* would be entitled to nominate the directors, &c. That *Mappin* should and would cause the said intended company to pay or secure to *Skoines* the £4000 cash, and should and would procure the allotment to *Skoines* of the shares thereinbefore provided for, and thereupon *Skoines* should execute a proper assignment of the patent to *Mappin*, or as he might direct, such assignment to be prepared by and at the cost of *Mappin* or the said intended company. If *Mappin* should fail to form the said company, or if the company should not allot shares to shareholders, or should not secure to *Skoines* the £4000 and allot to him the shares, &c., then the agreement to be void and the deposit

C. A. of £1000 to be forfeited,' and the patent to be re-assigned to
1875 *Skoines*. On the 23rd of October, 1873, an agreement was entered
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pany, by which *Mappin* agreed to sell, &c., the patent, &c., to
Wright, &c., for £125,000, payable, £7500 in cash twenty-one days
after a resolution for allotment of shares to shareholders by the
directors of the said company, and an adoption by the direc-
tors of this agreement, £7500 in two months afterwards, £45,000
in fully paid-up preference shares at £10 per cent. dividend, and
£65,000 in fully paid up deferred shares; *Mappin* to be appointed
by the company managing director. The company was formed,
and was registered on the 4th of November, 1873. *Mappin* was
appointed a director; and afterwards a prospectus was issued,
with his knowledge and assent, in which his name appeared as a
director. This prospectus invited applications for 4500 shares
of £10 each in the company, capital £300,000, &c. The company,
it said, was established for the purpose of acquiring and working
Skoines' patent; that the first issue was for £165,000, in 16,500
shares of £10 each, of which 4500 were now offered for sub-
scription, the remaining 12,000 shares having been taken in
part payment by the vendor, &c. The prospectus then stated
that an agreement had been made, dated the 23rd of July,
1873, between *Mappin* and *Wright* on behalf of the company,
and a copy might be inspected at the company's office. The
prospectus made no mention of the agreement of the 23rd of
July, 1873. The Appellant, Miss *Gover*, saw this prospectus
on the 12th of January, 1874, and it is to be taken that she
was induced by the statements therein contained to apply for
ten shares, which were allotted to her, and in respect of which
her name was entered on the register. The company was un-
successful, and Miss *Gover* was pressed for payment of the
amount remaining unpaid on her shares, and thereupon, in 1875,
applied as at first stated.

Upon this state of facts it was argued on behalf of the Appellant
that the agreement of the 23rd of July, 1873, was not a mere
contract of sale and purchase between *Skoines* and *Mappin*, but a
contract to be fulfilled only by *Mappin* forming a company; that

of itself, therefore, constituted *Mappin* a promoter of the company; that it was, therefore, to be taken as made whilst he was a promoter of the company, and, therefore, that, by virtue of sect. 38 of the *Companies Act*, 1867, the agreement ought to have been disclosed in the prospectus. It was further contended that the agreement ought to have been disclosed in the prospectus, although *Mappin* was not a promoter when it was made, because he was a promoter of the company, and was a director of it when the prospectus was issued. It was contended that inasmuch as the prospectus was issued partly by *Mappin*, and the omission of any mention of the contract of the 23rd of July must have been known by him, the prospectus must be deemed to be fraudulently issued by him when he was a director. And as the Appellant was induced to become a subscriber by the prospectus which was issued by a director, the company could not have maintained an action or suit to oblige her to pay calls, and consequently it should be held that her name was on the register without sufficient cause, and should be removed by virtue of sect. 35 of the *Companies Act*, 1862. It was further contended that, without having recourse to sect. 38 of the Act of 1867, the concealment was such as to amount to making the prospectus a fraudulent misrepresentation, and, therefore, the Appellant was entitled to the relief she asked.

On behalf of the company it was contended that the agreement of the 23rd of July, 1873, was a mere contract of purchase and sale between *Skoiner* and *Mappin*; that it did not constitute *Mappin* a promoter of the company; that there was no occasion to disclose it either to the company or to any shareholders either before or since the statute of 1867; that it was a matter wholly immaterial either to the company or to a proposed shareholder: If it was a contract which ought to have been communicated without reference to the statute of 1867, the concealment of it was not such as made the prospectus a misrepresentation, and, therefore, could not entitle the applicant to relief independently of sect. 38 of the statute. It was urged that the case was not within sect. 38 of the statute of 1867, because *Mappin* was not a promoter of the company when the agreement was made, and because it was not made on behalf of the company or so as to bind the company to anything. The true meaning of sect. 38, it

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was said, is, that it requires mention to be made in a prospectus of any contract made by a person who at the time he made it was in a fiduciary relation to the company, and applied therefore only to such agreements as it would be deemed fraudulent in equity not to disclose to the company, or to such agreements as it would before the enactment have been fraudulent not to disclose to the shareholder. And it was said that the only new thing introduced by the statute with regard to such contracts was that they must be mentioned in the prospectus.

It was then contended that the agreement of the 23rd of July, 1873, was not a contract made by *Mappin* when he stood in any fiduciary relation to the company; that it was not a contract which before the statute it would have been deemed in equity fraudulent not to disclose to the company, not one which it was fraudulent to conceal from the shareholder—therefore, not one which by virtue of sect. 38 it was necessary to mention in the prospectus. It was further contended that, if the non-mention of the contract in the prospectus made the prospectus one which was to be deemed fraudulent by virtue of sect. 38 of the Act of 1867, such section gave only as remedy a right of action against the promoter or director, and did not affect the company; that if the subscription for shares of the shareholder whose name was on the register could not otherwise be impeached, the company was not, by reason of a breach by a promoter or director of the obligatory part of sect. 38, precluded from insisting on a payment of calls by the shareholder, and that the shareholder had no remedy under sect. 35 of the statute of 1862.

These arguments raise the following questions :—

1. What is the true legal and practical effect of the facts with regard to the application to them of the law?
2. Can the Appellant maintain her application without reference to sect. 38 of the statute of 1867?
3. If not, what is the true construction of sect. 38 with reference to the contention that the case is within it?
4. If the facts are brought within sect. 38 of the statute of 1867, can the remedy which is prayed for under and by virtue of sect. 35 of the statute of 1862 be applied?

Now as to the first, it seems to me that the agreement of the

23rd of July, 1873, did not constitute *Mappin* a promoter of the intended company; it contained only a contract that he would become a promoter. That agreement, therefore, was made when he was not a promoter. That agreement did not pass the property in the patent to *Mappin* so as to enable him to sell it as his own to whomsoever he pleased; it amounted only to a contract to transfer the property to *Mappin* when certain conditions should be fulfilled. It was not a contract made on behalf of the company. It was not a contract the concealment of which made the prospectus a misrepresentation of the facts stated in it. But the contract of July and the contract of October formed together a transaction by and according to which in reality *Mappin*, who had no means wherewith to purchase the patent, undertook to promote and procure the constitution of a company which should pay to him for the patent £125,000, in such a way as should enable him to obtain a transfer of the patent to the company by his paying to *Skoines* for the patent £65,000. *Skoines* was willing to sell the patent to any one for £65,000. The two contracts together obliged him to transfer the patent to the company for £65,000 only paid to him, but for £125,000 to be paid by the company. In other words, they formed a transaction by which the company was to pay £125,000 for a patent which the owner was willing to sell for £65,000, in such a way that *Skoines*, the owner, obtained £65,000, and *Mappin*, the subsequent promoter, £60,000, as their respective shares of the £125,000. The realization of profit by *Mappin* depended on his being able to persuade a sufficient number of persons to subscribe to the extent of £125,000 for the transfer of a thing which the owner was willing to transfer to any one for £65,000.

The interest of *Mappin* to procure shareholders to form a company was therefore of the highest intensity. I thereupon come to the conclusion that the dullest or most careless subscriber would listen to the persuasions of *Mappin* with very different faith according as he did or did not know the position of *Mappin* with regard to the patent and the proposed company. In other words, a knowledge of the first contract would, or might reasonably be expected to have an important effect on the faith of a proposed shareholder in the persuasions to him of *Mappin* to

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C. A. become a shareholder in the company. The contract was made
1875 when *Mappin* was not a promoter. The prospectus was issued
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which entitle one to find proved against *Mappin* so grave a charge
as that he was guilty of intentional fraud. It seems to me that
the concealment or non-disclosure of the contract of July did not
make the disclosure of the contract of October a misrepresentation.

I therefore, with regard to the second question, come to the
conclusion that the Appellant cannot maintain her application
without calling in aid sect. 38 of the statute of 1867. The real
question, therefore, in this case is, what is the true construction of
sect. 38 of the statute of 1867?

Three canons of construction seem applicable in this case.

First, that the statute is to be construed, if possible, according
to the ordinary grammatical construction of the phraseology used
in it. Secondly, if there be doubt as to the construction, or if a
construction according to strict grammar would lead to a mani-
festly unreasonable or absurd conclusion, the statute must be con-
sidered with regard to the state of the law at the time when it was
enacted. Thirdly, if the enactment be manifestly intended to be
remedial, it must be so construed as to give the most complete
remedy which the phraseology will permit. Now, I think it can-
not be doubted by any one who reads the section that it was
passed in order to give additional protection to unwary subscribers
for shares. It is, therefore, a remedial section. If it be read
strictly according to its grammatical construction, it does, as was
suggested, include contracts which it is manifestly absurd to sup-
pose should be mentioned. It cannot, therefore, without absurdity,
be construed strictly according to its grammatical construction—
some limitation must be inferred. It is a section, therefore, which
is to be construed with regard to the state of the law at the time
when it was enacted.

Immediately before this section was passed the law was thus:
if a subscription for shares in a company was obtained by a frau-
dulent misrepresentation, or by a fraudulent concealment so great
as to make that which was stated in effect a misrepresentation, the
company could not, either by action at law or in the course of
any proceeding in equity, enforce payment of any call made in

respect of such shares, and the shareholder could recover back money paid as for calls on those shares, and the shareholder could obtain the removal of his name from the register of shareholders. If a subscription for shares were obtained by a misrepresentation of facts, though not fraudulently made, a Court of Equity would prevent the company from compelling payment of a call, would compel restitution of money paid for a call, and would remove the name from the register of shareholders. But for a mere non-disclosure, fraudulent or otherwise, which had not the effect of rendering that which was disclosed or stated a misrepresentation, however otherwise important for the consideration of an invited subscriber, there was no remedy either in law or equity if he became a registered shareholder.

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One would expect a remedial enactment passed under such circumstances to cover the unprotected danger, that is to say, to insist on the disclosure of everything which might reasonably have an effect on the mind of an invited subscriber for shares as to whether he should trust the representations made to him and become a shareholder. Now, the 38th section refers to two periods of time: one is a fixed moment of time, the other an indefinite period. The fixed moment is that of the issue of a prospectus or notice, the indefinite period is all time previous to the fixed moment. The thing dealt with at the fixed moment is the prospectus or notice. That prospectus or notice is to specify certain things. That prospectus or notice is to be one issued by a promoter, director, or officer of the company, that is to say, by a person who is, when he issues the prospectus or notice, a promoter, director, or officer. The thing to be specified is something which had been entered into before the issue of such prospectus or notice, that is to say, at any time before such issue. The thing which is to be specified is a contract. It may be a contract "entered into by the company," or a contract made "subject to adoption by the directors or the company," or a contract made "otherwise," that is to say, not subject to adoption by the company. It is a contract entered into by a person described as a promoter, director, or trustee of the company. It is consistent with the grammatical construction that it was intended either that the person should be a promoter, director, or trustee at the time

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when the contract was made, or that the contract should be one which had been formerly made by a person who at the time of his issuing the prospectus is a promoter, director, or trustee. The question is, which of these two meanings is to be attributed to the section?

Now, I have already declared that, in my opinion, the two contracts in this case form in effect such a transaction as would cause a knowledge of the first contract to be material to an invited subscriber, although it was made at a time when *Mappin* was not a promoter or director of the intended company. In many other cases I think it cannot be doubted that the knowledge of a contract made by an inviting promoter or director before he was either would reasonably affect the mind of an invited subscriber as to whether he should give faith to such a promoter or director. Applying the three canons of construction to which I have referred, considering that the statute cannot without absurdity be treated as if it were so large as a strictly grammatical construction would make it, but considering that it is a remedial enactment and therefore should be construed so as to give the largest reasonable protection, and so as to cover, if possible, the whole of that which was unprotected by the pre-existing law, I come to the conclusion that it includes every contract made before the issue of the prospectus, the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, director, or trustee issuing the prospectus, whether such contract was made by such promoter, director, or trustee before or after he became a promoter, director, or trustee, and whether or not such contract was made on behalf of, or so as, if adopted, to impose a liability on, the company, and I am of opinion that the contract of the 23rd of July, 1873, was one within sect. 38 of the Act of 1867, and ought to have been mentioned in the prospectus. I am of opinion, further, that the prospectus is, by virtue of sect. 38, to be deemed fraudulent on the part of *Mappin* as regards the Appellant.

The next question is whether the Appellant can maintain this application made under sect. 35 of the Act of 1862. This, again, really depends on the true construction of sect. 38 of the Act of 1867. It is said that this section gives only a remedy by action

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against the promoter, director, or trustee who issues the prospectus. The answer to this suggestion seems to me to be that it gives no remedy at all against any one. It does not mention remedy. It does not deal with remedy. The section of itself, that is to say, a breach of the provision by itself, gives no cause of action or suit, and no title to remedy. Suppose a prospectus issued in breach of its requirements, but no evidence that any registered shareholder was induced to become a shareholder by such prospectus, no shareholder would have cause of action or suit or title to any remedy. So, again, if a shareholder, induced to become so by such a prospectus, has lost his right of suit or remedy by acquiescence or delay.

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If, then, the section mentions no remedy, refers to no remedy, and of itself gives no title to any remedy, why should it be construed so as to give one only of several remedies? Why should it not be construed as adding to the law, for the protection of a class which the statute deals with as requiring further protection, a new subject-matter which, under certain circumstances, would entitle to relief by the old remedies? There is nothing in the section which points more to a remedy by action against the person than to any other remedy. Why should it be held to give that remedy rather than any other, and that only? It is suggested that "on the part of" is to be read as if the phrase were "as between." In the first place, that is an alteration; and, secondly, it brings us to this strange conclusion, that the prospectus is to be considered fraudulent as between say all the directors who have issued it on behalf of the company so as to make them liable to the shareholder in an action charging that they obtained his subscription for shares by fraud, whilst at the same time the company is to have the full benefit of his subscription so obtained.

Another anomaly arising from the interpretation suggested seems to me to be that an enactment evidently made for the protection of unwary subscribers for shares which is contained in a statute worked, and intended to be worked, mainly in a Court of Equity, gives no protection or remedy in equity, but only at law. It has been further suggested that to grant the application is to injure innocent shareholders and innocent creditors; and that is

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1875 subscriber for shares should be made to suffer more than innocent
GOVER'S CASE. shareholders or creditors who have not been deceived. And, more-
over, it is to be observed that the shareholder thus called upon to
pay calls has received no advantage from the contributions of the
other shareholders or the property of the creditors.

In conclusion, therefore, I am of opinion that the Appellant was
entitled to the relief she claimed, and that the decision of the
Vice-Chancellor cannot be supported.

JAMES, L.J.:—

The appeal will be dismissed with costs.

Solicitor for Miss *Gover*: *G. Davis*.

Solicitors for Official Liquidator: *Wilkins & Blyth*.

BIDDULPH *v.* WILLIAMS.

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Settlement—Joint Power of Appointment—Appointment to Trustees for Sale—Absence of Declaration of Trusts of Proceeds of Sale—Resulting Trust.

Under a settlement real estate was limited to such uses as *A.* and *B.* should by deed jointly appoint, and subject thereto to the use of *A.* for life, with remainder to the use of *B.* for life, with remainder to the first and other sons of *B.* in tail, with divers remainders over; and there was a power of sale vested in four trustees and exerciseable at the request of *A.* and *B.*, and the survivor of them. By a deed (which contained a recital that *A.* and *B.* were desirous of selling part of the settled property, and with a view to facilitate the sale and conveyance thereof to the respective purchasers, had agreed to execute the deed), *A.* and *B.*, in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to shew that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale:—

Held, that the disposition of the proceeds of sale was a question of intention; and that, both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement.

BY indentures of lease and release dated the 25th and 26th of May, 1832, certain real estate was settled (subject to certain incumbrances) to such uses as *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph* (the eldest son of *Charlotte Myddelton Biddulph*) should by deed jointly appoint, and in default of appointment, and subject thereto, to the use of *Charlotte Myddelton Biddulph* for her life, with remainder to the use of *Robert Myddelton Biddulph* for life, with remainder to the first and other sons of *Robert Myddelton Biddulph* successively in tail male, with divers remainders over. The release contained a power of sale vested in four trustees and exerciseable at the request of *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph* and the survivor of them; and the proceeds of any sale made under this power were to be invested in land to be settled to the same uses as the property sold.

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In the early part of 1843, *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph* were desirous that part of the settled property should be sold; and it was considered most advantageous that it should be sold in a considerable number of lots. At this time the four trustees in whom the power of sale was vested were residing in different parts of the country, and *Charlotte Myddelton Biddulph* was far advanced in life and in an infirm state of health.

By an indenture dated the 25th of March, 1843, made between *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph* of the one part, and *William Wilson* and *Edward Williams* of the other part, after reciting the said indentures of lease and release, and also reciting that *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph* were desirous of selling and disposing of the several hereditaments described in the schedule thereto, and with a view to facilitate the sale and conveyance thereof to the respective purchasers of the same, had agreed to make and execute the indenture now in statement; it was witnessed that the said *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph*, in exercise of the said power of appointment reserved to them, did thereby appoint that the hereditaments described in the schedule thereto should thenceforth remain, continue, and be to the use of the said *William Wilson* and *Edward Williams*, their heirs and assigns, upon trust for sale as therein mentioned; and it was thereby agreed and declared that *William Wilson* and *Edward Williams*, their heirs, executors, administrators, and assigns, should stand possessed of the money to arise from the sale of the appointed hereditaments upon the trusts intended to be declared thereof by an indenture therein stated to be already prepared and intended to bear even date with, and to be executed immediately after the execution of, the indenture now in statement.

No indenture declaring the trusts of the proceeds of sale was ever prepared or executed.

Charlotte Myddelton Biddulph died on the 19th of August, 1843. Shortly after her death *William Wilson* and *Edward Williams* sold the larger portion of the appointed hereditaments, and paid the proceeds of sale, amounting to £11,006, to *Robert Myddelton Biddulph*. The remaining portion of the appointed hereditaments remained unsold.

In 1846, doubts appeared to have arisen whether the proceeds of sale had been properly paid to *Robert Myddelton Biddulph*, and he executed a deed dated the 1st of September, 1846, by which he conveyed certain property to *William Wilson* and *Edward Williams* upon trusts, for securing to them an indemnity in respect of any liability they might have incurred, or might thereafter incur, by reason of having paid to *Robert Myddelton Biddulph* the sum of £11,006, or otherwise by reason of the trusts reposed in them by the indenture of the 25th of March, 1843.

Robert Myddelton Biddulph died on the the 21st of March, 1872, having had issue *Richard Myddelton Biddulph*, his eldest son, and five other children. On the marriage of *Richard Myddelton Biddulph* the property comprised in the indentures of the 25th and 26th of May, 1832, was re-settled, and now stood limited to the use of *Richard Myddelton Biddulph* for life, with remainder to his eldest son *Robert Edward Myddelton Biddulph* in tail.

Edward Williams survived *William Wilson*, and died in 1869, having by his will devised all estates vested in him as trustee to *Edward Williams* the younger and *George Williams*, whom he appointed his executors.

The bill in this suit was filed by the executor and trustee of the will of *Robert Myddelton Biddulph* against *Edward Williams* the younger, *George Williams*, *Richard Myddelton Biddulph*, *Robert Edward Myddelton Biddulph*, and the legal personal representatives of *Charlotte Myddelton Biddulph*, and prayed that it might be declared that the sum of £11,006 was rightly paid to *Robert Myddelton Biddulph*; and that he was at the time of his death absolutely entitled to the unsold portion of the appointed hereditaments; that *Edward Williams* the younger and *George Williams* might be ordered to sell the said unsold portion and pay the proceeds of sale to the Plaintiff, or in the alternative to convey the said portion to the uses declared by the will of *Robert Myddelton Biddulph* of his real estate; and to re-convey the property comprised in the indemnity deed of the 1st of September, 1846, and to release the estate of *Robert Myddelton Biddulph* from such indemnity.

The suit now came on to be heard. As evidence of the intention of the parties to the deed of the 25th of March, 1843, the

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Plaintiff put in evidence three letters which passed between *Robert Myddelton Biddulph* and *Edward Williams*, his solicitor and one of the trustees of the deed. The Defendants waived any objection to the admission of these letters, which so far as material were as follows :—

“ *Oswestry*, April 22nd, 1843.

“Dear Sir,—I have commenced the somewhat troublesome occupation of disposing of your chief rents and encroachments; and as I proceed in my labours, the necessity of making some provision for obviating the difficulties which would arise in the event of your mother's death becomes more apparent. I have already fully explained to you that your mother and yourself during your joint lives have full power to deal with the estate, including the chief rents and encroachments, as might be deemed advisable. In the event, however, of the death of either, such power will be at an end, and a title to the chief rents and encroachments could then be made only through the medium of the trustees of your marriage settlement, who are four in number. If I had at this moment effected sales of all the chief rents, &c., your mother and yourself might effectually convey to the purchasers, but as there would probably be two or three hundred of them, the task of signing so many deeds would necessarily be very irksome to your mother in her present infirm and (I fear) precarious state of health. If before the sales were effected your mother were to die, I need not point out to you the trouble and consequent expense that would arise by reason of the different deeds having to be executed by the trustees of your marriage settlement, who reside remote from hence and from each other. It is to be borne in mind, too, that the sales of the chief rents, &c., will be effected at different times and as occasion may serve, though I hope and trust to see all of them transferred to other hands before this time of another year shall have arrived. It would, however, be dangerous as regards your mother's health, and inconvenient with reference to future proceedings, to allow matters to remain in their present state; and it has occurred to me that it will be desirable for your mother and yourself immediately to execute the power contained in your marriage settlement for the purpose of taking the chief rents, &c., out of the operation of the settlement.

In doing this, and with a view of facilitating future measures, I would beg to suggest that the chief rents, &c., should by the exercise of the power I have alluded to be vested in Mr. *Wilson* upon trust for sale, who could then execute conveyances to the different purchasers whenever necessary to do so, and without the trouble and expense of resorting to any other person. If you should concur in these views, and will be kind enough to let me hear from you to that effect, not a moment shall be lost in preparing the necessary deed for your mother and you to execute.

“*Edw. Williams.*”

“Col. *Myddelton Biddulph, Chirk Castle.*”

“My dear Sir,—I fully concur in the opinion that no time should be lost in excepting the chief rents from the operation of my marriage settlement. I also agree in the propriety of vesting them in some party for sale. I think Mr. *Wilson with yourself*—if you would undertake the task—would be the most satisfactory trustees. I propose this for your consideration, as I think I have heard of much difficulty arising in the event of the death of a single trustee. You may be sure I have no other motive. The deed to be prepared for my mother’s signature will, I conceive, have reference to no other subject than that of the chief rents. In her present state of health it is most desirable no time should be lost. I have a very indifferent account by to-day’s post, though not worse than the last . . .

“I am, my dear Sir, yours sincerely,

“*R. Myddelton Biddulph.*”

“*Chirk Castle, April 23rd.*”

“*Oswestry, April, 1843.*”

“Dear Sir,—I shall not have any objection to my name being associated with Mr. *Wilson* as trustee for sale of the chief rents and encroachments, and probably, for the reason you give, it would be as well that he should not stand alone.

“The deed necessary for taking the chief rents and encroachments out of the operations of your settlement, and vesting them in Mr. *Wilson* and myself for sale, is now preparing, and as your mother’s health appears to be so uncertain and precarious, I am

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very anxious to have her signature procured to it without a moment's delay. I should therefore be much obliged if you would write to her explaining the nature of the deed, and requesting her to execute when my agent shall call upon her for the purpose of procuring her signature. If you could without inconvenience send me such letter by the bearer, or let me have it to-morrow morning, I will send it with the deed to my agent by the mail in the evening, and he could then call at your mother's house on Wednesday morning. I am the more anxious to see this deed executed, as, in case we should have to resort to the trustees of your settlement to complete the sales, much trouble, inconvenience, and expense would arise. The deed would refer only and exclusively to the chief rents, cottages, and encroachments, and will not affect any part of the ancient estate or any of the trusts or limitations in your settlement relating to the matter . . .

“*Edw. Williams.*”

“*Col. M. Biddulph, Chirk Castle.*”

Fischer, Q.C., and Romer, for the Plaintiff:—

We submit that it was the intention of *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph* to take part of the settled property out of the settlement, and make it their own. With that view, they execute a deed irrevocably appointing part of the property to trustees upon trust for sale; and they propose to declare trusts of the proceeds of sale of another deed. That deed is not executed. What is the effect of the absence of that deed? Simply this, that there is a resulting trust in favour of the persons making the appointment: *Sugden* on Powers (1); *Chamberlain v. Hutchinson* (2); *Fosberry v. Smith* (3); *Garth v. Townsend* (4); *Brickenden v. Williams* (5); *Wilkinson v. Schneider* (6); *In re Davies' Trusts* (7); *Simmons v. Pitt* (8). In that case the appointors would be jointly entitled to the fund, and *Robert Myddelton Biddulph*, as the survivor, would take the whole.

As evidence of the intention of the parties, we rely on the letters, which shew that the intention of the parties was to take the pro-

(1) 8th Ed. p. 467.

(2) 22 Beav. 444.

(3) 5 Ir. Ch. Rep. 321.

(4) Law Rep. 7 Eq. 220.

(5) Law Rep. 7 Eq. 310.

(6) Ibid. 9 Eq. 423.

(7) Ibid. 13 Eq. 163.

(8) Ibid. 8 Ch. 978.

perty out of settlement. We also rely on the payment to *Robert Myddelton Biddulph*; and we say that at this distance of time that payment must be presumed to have been properly made. It is true the trustees took an indemnity in 1846, but that is explained by the circumstance that in the absence of a deed declaring the trusts of the purchase-money, those trusts might be difficult to prove. No deed was, however, necessary. The donees of a power, given to them for their own benefit, chose to exercise it by appointing to trustees for sale. Their object was to take the property out of the settlement so as to make it their own, and effect must be given to their intention.

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Cookson, Q.C., and *Freeling*, for the representatives of *Charlotte Myddelton Biddulph*, made no claim to the fund.

Chitty, Q.C., and *Harrison*, for *Edward Williams* the younger and *George Williams*.

Southgate, Q.C., and *Langworthy*, for *Richard Myddelton Biddulph*, and

Davey, Q.C., and *Smart*, for *Robert Edward Myddelton Biddulph*, were not called upon.

JESSEL, M.R.:—

The questions I have to decide are really two; and it is a very great comfort to me that, even assuming I am wrong on the first, I should certainly feel great confidence that I am right on the second.

The first question that I have to decide is, whether, considering the terms of the original settlement of 1832 and the terms of the indenture of appointment dated the 25th of March, 1843, there is a resulting trust of the proceeds of the sale, as to which no trusts are declared for the appointors or for the persons entitled under the original settlement.

The second question is, whether, without assuming that there was or was not a resulting trust for either of the two sets of persons who would be interested, there is or is not sufficient contemporaneous evidence to shew what the trust was.

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I have arrived at the conclusion, first of all, that according to the true construction of the deeds, the resulting trust is for the benefit of those who take under the settlement, and, secondly, that according to the true construction of the contemporaneous evidence, which is fortunately in writing, it was intended that the settlement should not be disturbed except so far as the substitution of money for certain outlying portions of the estate would necessarily interfere with it.

First, as regards the deeds independently of the contemporaneous evidence. The deeds of lease and release of 1832 were the common settlement of a family estate; the only singularity or exception from the ordinary form being, that the first tenant for life happens to be a lady instead of a gentleman. The successive tenants for life are mother and son, instead of, as is usually the case, father and son. These deeds settle family estates, subject to a joint power in the mother and son, to uses in what we call strict settlement, namely, to the mother for life, to the son for life, to his first and other sons in tail, with the ordinary powers, amongst which is a power of sale vested in four trustees, and exerciseable at the request of the mother and son, and the survivor of them. We then find an indenture dated the 25th of March, 1843, the meaning of which must be ascertained not merely by the operative part but by the recitals. It is a deed made between the mother and son of the one part, and two persons, one of whom is the solicitor and the other the land agent of the son, of the other part. It recites the settlement of 1832, to shew the limitations down to the life estate of the son, and then it goes on: "And whereas the said *Charlotte Myddelton Biddulph* and *Robert Myddelton Biddulph* are desirous of selling and disposing of the several messuages or tenements, cottages, lands, rents, and hereditaments in the schedule subscribed to these presents mentioned, described, or referred to, and with a view to facilitate the sale and conveyance thereof to the respective purchasers of the same, have agreed to make and execute these presents." Then there is an appointment to trustees upon the usual trusts for sale, with power of giving receipts, and there is a declaration that "*William Wilson* and *Edward Williams*, their heirs, executors, administrators, and assigns, shall stand and be possessed of and interested in all the

money to arise or be produced from the sale of the rents and hereditaments hereinbefore appointed upon the trusts intended to be expressed and declared of and concerning the same in and by an indenture already prepared, and intended to bear even date with and to be executed immediately after the execution of these presents." Two things are therefore clear from that deed, namely, first, that the object of the deed was not to enable them to sell and dispose, but simply to facilitate the sale and conveyance; and, secondly, that the disposition of the purchase-moneys was not intended to be made by this instrument. It was not a complete appointment in equity, but there was intended to be a further instrument which would complete the appointment by declaring the trusts. It is not, therefore, the case of a person having a general power of appointment making what he believes to be a complete appointment, or which he intends to be a complete appointment, but executing a deed for a specific purpose mentioned in the deed, and abstaining knowingly from declaring the trusts of the moneys to arise from the sale, leaving them to be declared by a separate instrument.

Now, what is the legal effect of that? It is emphatically a question of intention. You are to ascertain from the deed whether the appointor, or in this case the appointors, intended to deal with the beneficial interest, and then I suppose those authorities would have some application which say that when you conceive that a single appointor intended to destroy the ownership or the ownerships of the persons entitled under the settlement in default of appointment, there must be an intention to make the money his own, because it could be nobody else's. If a person has a general power of appointment, and appoints the fund to *A. B.*, and for any reason *A. B.* cannot take, it may well be argued that the appointor had shewn that the persons entitled under the settlement were not to take, whoever were to take, because there has been shewn a complete intention to deprive them of all interest. That is an intelligible argument as to intention. But when you see that the parties do not intend by this deed to deal with the money, that is the beneficial interest in the money, why are you to say that there is an intention to make it their own in the absence of that further instrument declaring that intention? It is an incomplete instrument so far as beneficial interest is concerned; but, besides that,

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we have a statement that the object of the deed is not to enable them to dispose of the property, but is simply to facilitate the sale, that is to say, it is simply machinery for carrying out a sale. Taking, then, the recital that it is intended to be a part of the machinery for carrying out a sale, and the declaration that there is a future disposition intended to be made of the proceeds of sale (shewing that they make no present disposition of the money), it seems to me that there is clear evidence that they did not intend to make the money their own by that document, but that they intended not to deal with the beneficial interest by that document, and consequently that the beneficial interest would fall to be dealt with by the original settlement, and the trusts, or resulting trusts, would be the trusts of that settlement. That might, in the case before me, possibly have given rise to a subsequent question, whether the money would have been considered to result on the same trusts as the purchase-money of estates sold under the power contained in the settlement, or whether the first tenant in tail born would take it absolutely.

I now come to consider the second point, and for that purpose it is not necessary to consider whether I am right or wrong in my construction of the deeds. The correspondence begins with a letter from the solicitor, Mr. *Williams*, of the 22nd of April, 1843, the deed being subsequently executed, or at least I suppose it must have been subsequently executed, although apparently it is dated the 25th of March, 1843. As we know, dates are not to be relied upon, and I am satisfied that the deed was executed subsequently to the date of this letter. [His Lordship then read the letter, and continued:—] What does that mean? The contingency he is going to provide against is the death of the mother, which will compel him to resort to the four trustees. If that event were to happen, he does not doubt that the trustees would consent to sell; but he says there are four of them, they reside at places remote from each other, and of course there will be labour and expense. What he wants to provide against, as he tells us, is the trouble and expense of having to deal with four trustees. There is not a suggestion that the distribution of the money is to be altered. He treats the execution of the deed he proposes as a mere substitution for an application to the

trustees to exercise the power of sale; he proposes the execution of the deed with the object of avoiding trouble and expense, and he suggests it as an alteration in the machinery of carrying out the sale. The answer is this:—[His Lordship read it.] Then we have a reply from the solicitor, also dated April. [His Lordship read it.] There is not a suggestion in this letter that there is to be any change in the disposal of the money. He knew, and everybody knew, that under the settlement the money must be re-invested in the ordinary way in the purchase of land. It is true that he speaks of the property being taken out of the operation of the settlement; but it appears to me, when the letter is fairly construed, it shews that he was telling Colonel *Myddelton Biddulph* that it was indifferent as far as essentials were concerned—that is, as far as regards the beneficial interest—whether the sale was carried out one way or the other. He says that if his mother dies without executing the deed it will cause trouble, inconvenience, and expense, but there is not a suggestion that he would thereby lose the property, which is the theory put forward on the other side, it being alleged that it was intended he should have the proceeds of the sale solely for his own benefit.

I must say it is very satisfactory to my mind to see this contemporaneous written evidence, because it confirms the view which I had previously taken of the settlement. But I am bound to say I feel very much greater confidence in my judgment as regards the interpretation of this evidence than I do as regards the result of that judgment on the deeds if they had stood alone. In fact, if I may say so, I arrive at a conclusion with greater certainty on the second point than on the first. I am of opinion, therefore, that the Plaintiff's case fails, and the bill must be dismissed.

Solicitors: *Hunter, Gwatkin, & Co.; Dean & Taylor; Parkers.*

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Nov. 25.

In re PACKMAN AND MOSS.

[1875 P. 137.]

*Will—Gift of “all my real and personal Property”—Charge of Debts—
Mortgaged Estate—Vendor and Purchaser Act, 1874, s. 9.*

A testator who was mortgagee in fee with a partial beneficial interest in the equity of redemption, devised to trustees all his real and personal estate upon trust, first, to pay his debts and funeral and testamentary expenses, and then, upon certain trusts, for his wife and children; and he gave to his trustees powers to sell or mortgage any part of his estate. The will contained no devise of trust or mortgaged estates:—

Held, on a summons under the *Vendor and Purchaser Act*, 1874, s. 9, that the legal estate in the mortgaged property did not pass under the will.

THIS was a summons taken out under the *Vendor and Purchaser Act*, 1874.

George Kimbell Borrett was at the date of his will and at the time of his death mortgagee in fee in possession of certain real estate, subject to the equity of redemption therein, to which, as to one moiety, he was entitled, and, as to the other moiety, certain other persons were entitled, with an ultimate contingent interest in himself.

The said *G. K. Borrett*, by his will, after certain bequests, gave and bequeathed to his wife and to *Thomas Nightingale* all his “property, real and personal, upon trust, first, to pay all my just debts, funeral and testamentary expenses; secondly, to pay over to my said wife during her widowhood the whole net annual return of the residue, or, should she re-marry, one-half of the said net return for her life; thirdly, in case of such re-marriage, then to apply the other half” to his children as therein mentioned; “fourthly, after the decease of my said wife, so soon as the last of my children shall attain the age of twenty-one years, to distribute the whole of the residue of my said real and personal estate. But should none of my children survive their mother, then, upon the decease of the last of them, I give and bequeath the whole of the residue absolutely to my wife. And I hereby give unto my said trustees full powers to sell, mortgage, or vary any part or parts of my said estate, real or personal; hereby also appointing them therein

But see Re Brown & Lilly 3 Ch D. 158 K M.

3 Ch D. 161.
4 Ch D. 71
5 Ch D. 505
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executrix and executor of this my will." The will contained no express devise of trust or mortgaged estates.

The testator died leaving his widow and an infant son his heir-at-law.

A contract had been entered into for the sale of the mortgaged property, and the purchaser made the objection that the legal estate did not pass under *Borrett's* will, but was vested in his infant heir-at-law.

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T. Stevens, for *Packman* and others, the vendors:—

The legal estate on the mortgaged property passed under the will. I admit that formerly there might have been some difficulty, where there was a charge of debts and legacies, in determining whether the legal estate in mortgaged property passed under such a devise, but that difficulty no longer exists, since the decision in *In re Stevens' Will* (1), where a testatrix directed her just debts to be paid, and then, after certain pecuniary legacies, she gave the rest, residue, and remainder of her real and personal estate to *J. T.* for her own personal use and benefit. It was there held by Vice-Chancellor *Giffard* that, though the testatrix's own real estate was charged with the payment of her debts and legacies, an estate of which she was mortgagee was not excepted from the residuary devise.

The rule as laid down by Lord *Eldon* in *Lord Braybrooke v. Inskip* (2) is, that a trust estate will pass under a devise in general terms, unless an intention to the contrary can be inferred from expressions in the will or from the objects of the testator. There is nothing in the trusts of this will to prevent the trustees from standing in the same position as the testator with reference to the mortgaged property.

The decision of Vice-Chancellor *Malins* in *Martin v. Laverton* (3) may be cited in opposition to the vendors' contention, but in that case the estate was devised in joint tenancy, and the Vice-Chancellor referred to the rule as laid down by Lord *Eldon* as being the one which was still recognised.

The legal estate would have passed if the testator had given

(1) Law Rep. 6 Eq. 597.

(2) 8 Ves. 417.

(3) Law Rep. 9 Eq. 563.

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 1875 those words cannot prevent its passing, especially where, as here,
In re the testator had a beneficial interest in the property.

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Field, for *Moss*, the purchaser, was not called on.

JESSEL, M.R.:—

I wish I could hear you, Mr. *Field*, for the reason of the thing is certainly in favour of Mr. *Stevens's* client; but the law as settled by the authorities is too clear the other way.

First, consider the position of the testator. He was mortgagee in fee in possession of the property and beneficial owner of a moiety of the equity of redemption, and trustee of the other moiety for various persons, including a contingent interest for himself. In that state of things he made his will, and gave to his widow and to one friend his property by this description, "All my property real and personal"—that looks as if he were dealing with that which was his own—"upon trust, first, to pay all my just debts, funeral and testamentary expenses"—they could only be paid out of his own property. [His Lordship then read the remaining trusts of the will.]

The question is, whether, having regard to the trusts of the will and the powers of sale and exchange given to the trustees, there is not an intention manifested on the face of the will to confine its operation to the property over which he conferred those powers on the trustees of the will.

I think there is such an intention manifested. There is no better settled rule than this, that you must ascertain from the whole will whether a testator is dealing with his own property or with that to which he is entitled as mortgagee or trustee. What Lord *Eldon* said in *Lord Braybrooke v. Inskip* (2) was this: "The rule is not that in every case where general words are used, the property shall or shall not pass; but that in each case you must look at every part of the will for the intention with regard to such property." If this passage had been present to the mind of the learned Vice-Chancellor who decided *Martin v. Laverton* (3), he

(1) 13 C. B. (N.S.) 308. *9 Jur. N.S.* (2) 8 Ves. 417, 435.

(3) Law Rep. 9 Eq. 563, 568.

30th D. 162.

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would not have supposed that Lord *Eldon* intended to lay down any such general rule as he there represented. The only universal rule of construction in these cases by which we can ascertain whether trust and mortgaged estates pass is, that the intention of the testator is to be gathered from the whole will. Looking, therefore, at this will, at the nature of the trusts, and the nature of the powers given to the trustees, I hold that the legal estate in the mortgaged property did not pass, and therefore dismiss the summons with costs.

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Solicitors: *Bailey, Shaw, Smith, & Bailey; Newman, Stretton, & Hilliard*, agents for *F. & C. I. Warner, Winchester*.

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[1875 E. 70.]

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Nov. 27.

Testamentary Power of Appointment—Fund—Excessive Appointment—Lapse—Hotchpot Clause—Life and Reversionary Interests.

The donee of a testamentary power of appointment over a fund of £7000 exercised the power by appointing sums of £1995, £4000, £4000, and £5, amounting in all to £10,000. The appointee of one of the sums of £4000 died in the testator's lifetime:—

Held, that the other appointees, and not the persons who would take in default of appointment, were entitled to the benefit of the lapse.

Life and reversionary interests must be brought into hotchpot under the usual hotchpot clause.

UNDER a deed dated the 6th of August, 1856, a sum of £10,000 charged on real estate was directed to be held upon trust for the children of *Charles Thomas Eales* in such shares, proportions, and manner as *Charles Thomas Eales* should by deed or will appoint, and in default of and subject to any appointment as to £5, part of the trust fund, for *Harriet Sarah Eales* (a child of *Charles Thomas Eales*), and as to the residue thereof for *George Daniel Eales* and *John Thomas Eales* (children of *Charles Thomas Eales*), in equal shares as tenants in common: and there was the usual hotchpot clause.

2ck D. 688.
4ck D. 663.

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By a deed-poll dated the 11th of December, 1860, *Charles Thomas Eales* appointed the sum of £3000, part of the sum of £10,000, to *George Daniel Eales*.

By his will, dated the 11th of January, 1870, *Charles Thomas Eales* appointed £1995, part of the £10,000, to *Charles Eales*; £4000 further part thereof to *George Daniel Eales*; a second sum of £4000, further part thereof, to trustees upon trust for *John Thomas Eales* for his life or until he should become bankrupt or incumber the same, and after the determination of such interest, upon trusts for the benefit of the wife and children of *John Thomas Eales*; and £5, the remaining part thereof, to *Harriet Sarah Eales*.

By a codicil dated the 21st of July, 1871, *Charles Thomas Eales* revoked the trusts of the second sum of £4000, by the will limited to take effect after the determination of the trust in favour of *John Thomas Eales*, and directed that from and after the determination of the last-mentioned trust, and subject thereto, the trustees should stand possessed of the second sum of £4000 upon trust for *Charles Eales*, *George Daniel Eales*, and *Harriet Sarah Eales*, in equal shares as tenants in common.

Charles Thomas Eales died on the 24th of February, 1874.

George Daniel Eales on the 19th of February, 1874, in the lifetime of *Charles Thomas Eales*.

This suit was instituted for the purpose of ascertaining the rights of the parties interested in the sum of £10,000, and now came on to be heard.

The questions were, whether the appointees under the will of *Charles Thomas Eales* were entitled to be paid the sums appointed to them in full; and whether *John Thomas Eales* was bound to bring into hotchpot the life and reversionary interests appointed to him by the will.

Chitty, Q.C., and *Chapman Barber*, for *Charles Eales*, said that as regards the first point there appeared to be no decision; but they submitted that the appointees, and not the persons entitled in default of appointment, must benefit by the lapse caused by the death of *George Daniel Eales*.

Bagshawe, Q.C., and *Cracknall*, for *John Thomas Eales*, referred to *Page v. Leapingwell* (1); *Easum v. Appleford* (2).

Langworthy, for the other parties, submitted that *John Thomas Eales* must bring into hotchpot the interests appointed to him by the will: *Rucker v. Scholefield* (3).

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JESSEL, M.R. :—

I shall say a few words on the first point, as there appears to be no authority which covers it.

The case is this. A testator, having power to appoint £7000 by will, thinks he has power to appoint £10,000; and accordingly makes a will appointing sums of £1995, £4000, £4000, and £5. If nothing more had happened it is quite clear that all these gifts must have abated, because there is not enough to pay the bequests in full. But one of the appointees has died, which augments the fund, exactly in the same way as if the testator had given pecuniary legacies of greater amount than his whole personal estate; and then one of these legatees had died. In that case the personal estate would have been augmented for the benefit of the other legatees, and the appointees here are in the same position.

As regards the other point, it is quite clear that both life interests and reversionary interests must be brought into hotchpot. The value of them must be ascertained in the best way you can; and if you cannot agree, there must be an inquiry at Chambers on the subject.

Solicitors: *Dobinson & Geare*; *Benbow & Saltwell*.

(1) 18 Ves. 463.

(2) 5 My. & Cr. 56.

(3) 1 H. & M. 36. *9 Jan MS-17*

M. R.

BAGSHAW v. BUXTON LOCAL BOARD OF HEALTH.

1875

[1874 B. 2.]

Dec. 1, 2, 3.

Highway—Inclosure of Portions of—Obstruction—Duties of Surveyors of Highways—Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 69, 70.

2 L. D. 5.

In a suit to restrain surveyors of highways from removing a wall inclosing a piece of ground alleged to form part of a highway, the High Court of Justice has jurisdiction to decide whether the land does or does not form part of the highway; and if the Court comes to the conclusion that it does form part of the highway, an injunction to prevent the removal of the inclosure cannot be granted.

Semble, a wall inclosing part of a street is an obstruction to the "safe and convenient passage along" the street within the meaning of the *Towns Improvement Clauses Act, 1847*, whatever may be the width of the uninclosed portion of the street.

Semble, after it has been judicially determined that a particular object is an obstruction to a public highway, the surveyors of highways may remove the obstruction.

THE Plaintiffs, *Samuel Bagshaw* and *John William Potter*, were the occupier and owner of a house, No. 7. *Terrace Road, Buxton*. In front of this house was a narrow piece of ground, inclosed with a low wall and iron railings, and covered with shrubs and plants, and used as a front garden to the house. The inclosure appeared to have been made in or about 1858.

The Defendants were the *Buxton Local Board of Health*, duly incorporated in 1859 under the provisions of the *Local Government Act, 1858*.

The Defendants alleged that the piece of ground in question formed part of a highway within the district of the local board, and that the wall, iron railings, shrubs and plants, formed and were obstructions to the safe and convenient passage along such highway, and on the 11th of December, 1873, served on the Plaintiff *Samuel Bagshaw* a notice under the *Local Government Act, 1858*, requiring him within thirty days to remove such obstruction, and stating that in default he would be liable to a penalty, and that the board might proceed to remove the obstruction.

Terrace Road (exclusive of the piece of land in question) was, opposite the Plaintiffs' premises, about thirty-six feet wide.

The bill was filed in January, 1874, to restrain the Defendants from removing the alleged obstruction or otherwise disturbing the beneficial use, possession, or enjoyment by the Plaintiffs, or either of them, of the said front garden.

The cause now came on to be heard.

Roxburgh, Q.C., and *E. C. Willis*, for the Plaintiffs:—

We are in possession of the piece of land, and it is for the Defendants to shew that it forms part of the highway. Even if it does, we say that the Defendants have no power to remove the obstruction: *Bateman v. Bluck* (1). The Defendants only stand in the position of surveyors of highways; and under the Highway Acts surveyors have only limited powers to remove obstructions. None of these limited powers are applicable here: and the necessity for conferring limited powers by those Acts shews that surveyors were not intended to have unlimited powers. The notice appears to have been framed on sect. 70 of the *Towns Improvement Clauses Act*, 1847 (2), which is incorporated with the *Local*

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(1) 21 L. J. (Q.B.) 406.

(2) 10 & 11 Vict. c. 34, s. 69: "The commissioners may give notice to the occupier of any house or building to remove or alter any porch, shed, projecting window, step, cellar, cellar-door or window, sign, sign-post, sign-iron, show-board, window-shutter, wall, gate, or fence, or any other obstruction or projection erected or placed after the passing of the special Act against or in front of any house or building within the limits of the special Act, and which is an obstruction to the safe and convenient passage along any street; and such occupier shall, within fourteen days after the service of such notice upon him, remove such obstruction, or alter the same in such manner as shall have been directed by the commissioners, and in default thereof shall be liable to a penalty not exceeding 40s.;

and the commissioners in such case may remove such obstruction or projection, and the expense of such removal shall be paid by the occupier so making default, and shall be recoverable as damages: provided always, that except in the case in which such obstructions or projections were made or put up by the occupier, such occupier shall be entitled to deduct the expense of removing the same from the rent payable by him to the owner of the house or building."

Sect. 70: "If any such obstructions or projections were erected or placed against or in front of any house or building in any such street before the passing of the special Act, the commissioners may cause the same to be removed or altered as they think fit; provided that they give notice of such intended removal or alteration to the

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Government Act, 1858; but the piece of land in question had ceased to be part of the street before the Defendants were incorporated; and besides, the wall and shrubs do not obstruct "the safe and convenient passage along" the street, which is here thirty-six feet wide.

Southgate, Q.C. (*Hastings*, Q.C., with him), for the Defendants, referred to *Turner v. Ringwood Highway Board* (1).

JESSEL, M.R. :—

There are some questions which I think I must dispose of before I hear and decide upon the substantial question of fact in dispute; and for the purpose of disposing of these questions, I shall assume that the Defendants can prove to my satisfaction that the piece of garden in question is a part of a public highway which is vested in them as the local board under the Towns Improvement Acts; and when I say "vested," I mean vested *sub modo*, as far as a highway can be—not giving them necessarily a right to the soil. On that assumption, I am of opinion that the bill for an injunction to restrain them from removing the wall or taking away the shrubs and soil of the garden cannot be maintained.

It must be remembered that this suit comes to a hearing after the passing of the Judicature Acts, and I have now to decide the question of title between the parties. The great object of the new Acts was to prevent unnecessary and useless litigation, and the case must now be heard by a Judge who is competent to decide every question instead of sending the parties to have their rights decided before some other Judge, at the cost of very great expense and delay.

The Plaintiff says: "Assuming that I am wrongfully encroaching on the highway, and assuming also that the Defendants, who are the guardians of the highway, are right in saying that I have done so, yet they have no right under the terms of their Act of

occupier of the house or building against or in front of which such obstruction or projection shall be thirty days before such alteration or removal is begun, and if such obstructions or projections

shall have been lawfully made, they shall make reasonable compensation to every person who suffers damage by such removal or alteration."

(1) Law Rep. 9 Eq. 418.

Parliament or at common law to abate the nuisance, and if they abate the nuisance they render themselves liable to an action for trespass," and so forth. He further says that, under the circumstances, this Court, which at the same time decides that he is wrong in encroaching on the public highway, is bound, though it decides the question finally and for ever, to say that it will restrain the Defendants from abating that nuisance. If I were to come to such a conclusion as that, it would certainly be very extraordinary.

I will first of all consider the question as it stands, on the powers given to the Defendants by their Acts. The only material section to consider is the 70th section of the *Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. c. 34); but as that section refers to the 69th section, it is necessary to read it first. The 69th section is this: "The commissioners may give notice to the occupier of any house or building to remove or alter any porch, shed, or projecting window, step, cellar, cellar-door, or window, sign, sign-post, sign-iron, show-board, window-shutter, wall, gate, or fence, or any other obstruction or projection erected or placed after the passing of the special Act against or in front of any house or building within the limits of the special Act, and which is an obstruction to the safe and convenient passage along any street." That section is limited to an obstruction erected in front of a house or building, and the question of construction is whether the words in section 70, "any such obstructions or projections," include the wall of a garden. I find the word "wall" in the 69th section, and I have no doubt that a wall falls within sect. 70. The obstructions, if they are obstructions, are not the less obstructions because the land is used as a garden. A garden wall is a wall, and the shrubs which are planted in the garden will certainly come under the words "any other obstructions." I have no doubt that the wall and shrubs have obstructed, and that they are obstructions; so that the only question remaining is whether they are obstructions "to the safe and convenient passage along any street." Now, if this was a public and convenient highway, it was a street within the meaning of this Act. The words "along a street" mean along the whole of the street; and if you take and inclose a portion of the street itself, how can it be said that that is not an

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obstruction to the safe and convenient passage along the street? It appears to me that I should be cutting down this Act of Parliament and making it almost meaningless if I so held, and I am of opinion, therefore, that the Defendants are entitled, under the section in question, to remove this, being, as it is, in front of the house.

The next point I have to consider is this: whether, assuming that this section does not apply, I ought to restrain the Defendants by injunction. That brings me also to the consideration of a further question, as to which I believe there is no decision, namely, Who has the right to abate an obstruction of a public highway?

It is clear, on the authorities, that any individual who is specially injured by the obstruction has by common law a right to remove that which unlawfully causes a special injury to him. But a private individual has no right to remove an obstruction which causes no special injury to him, but which is simply an obstruction to the road as regards the public in general as distinguished from the individual. Has, then, no person, even at common law, a right to remove an obstruction which is an obstruction to all Her Majesty's subjects? I think that at one time either the Crown or the conservators of the road must, by their agents, have had such a right. Of course the ordinary proceeding was by indictment for the crime of obstructing the highway. The indictment did remove or get rid of the obstruction. The conviction decided that an obstruction existed, and under the judgment the sheriff would remove it. It is true that, according to the modern practice, the Judge suspends the conviction if the obstruction is removed by the offender; and in some cases, where there is summary jurisdiction, there is a special power to order removal of the obstruction. Still, it seems to me, the result of an indictment is to decide that somebody or other had the right to prostrate the obstruction, and the question is, who had that right? Surely the person who acts on behalf of the public must have the right to prostrate on reasonable notice. The reason which prevented the individual acting on behalf of the public does not seem to me to exist when there is a body or a person who is entitled to represent the public in this way, although no special statutory

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power may be given for this purpose. It seems to me only reasonable that when the right is decided (and I am limiting my observations to that case), that body or person should have the power to prostrate.

If that is so, and if I am now to decide the right as it would be decided in the case of an indictment, it would be very absurd that, having decided the right, and having decided that this obstruction ought to be prostrated, I should restrain the public body who are the guardians of the road from prostrating it. It appears to me that, even assuming that the public body had no right to prostrate without a decision as to the right, yet, when the Court decides that, it would be stultifying itself at the same time to award an injunction to prevent the public body doing that which the Court says it ought to do, viz., to get rid of the obstruction. Therefore, if I were of opinion that at common law the local board had no such right as representing the Crown or the public, and that by the statute no such power was given them, I should yet come to the conclusion that when the Court had decided that the Plaintiffs' erection was an encroachment and a wrongful thing amounting to a nuisance, it would be wrong, at his suit, to restrain the public body from abating the nuisance.

The only point remaining to be decided is the question of right to the parcel of land in question; and on that I must now hear the evidence. The burden of proof, of course, lies on the Defendants to shew that the local board is right in asserting that this parcel of land is a portion of the public highway.

Southgate, Q.C., and *Hastings*, Q.C., then argued the Defendants' case.

Roxburgh, in reply.

The MASTER OF THE ROLLS held that the piece of land formed part of the highway, and dismissed the bill with costs.

Solicitors: *Le Riche & Son*, agents for *James Potter*, Derby;
F. Venn & Son, agents for *W. & N. Bennett*, Chapel-en-le-Frith.

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Dec. 11.

In re BREEDS' WILL.

Maintenance—Interval between Twenty-one and Twenty-five—Advancement or Benefit of Child—Education—23 & 24 Vict. c. 145, s. 26.

W 11/11/75

A testator directed his trustees to pay to his widow the sum of £100 per annum for the maintenance and support of each of his children until he or she should attain twenty-one, with power to increase or decrease such allowance; and he empowered his trustees, with the consent of his widow, to advance any sums not exceeding in the whole one fourth of the presumptive share of any child for his or her placing out or advancement in life, or otherwise for his or her benefit; the residue to be held in trust for all the children of the testator, who being sons should attain twenty-one, or being daughters should attain twenty-five or marry, without any provision for the maintenance of unmarried daughters during the interval.

On a petition by the trustees, under *Lord St. Leonards' Act*, for the opinion of the Court:—

Held, that the trustees had no power either under 23 & 24 Vict. c. 145, s. 26, or by way of interest on their contingent shares, to allow maintenance to unmarried daughters during the interval; but that the advancement clause enabled them to advance the necessary sums of money for the purpose.

Semble, if the testator's estate were being administered by the Court, interest on their contingent shares would have been given by way of maintenance:—

Held, also, that the trustees would be justified in increasing the allowance for infant daughters of the testator so as to meet the expenses of education, as included in maintenance and support.

JAMES BREEDS, by his will, dated the 30th of January, 1867, directed his trustees to stand possessed of his residuary personal estate upon trust to pay to his wife the yearly sum of £500 during her widowhood, reducible to £100 in the event of her marrying again; and the testator continued:—"And upon further trust to pay and allow to my said wife during her widowhood the sum of £80 per annum for the maintenance and support of each of my children which shall be under the age of ten years at my decease, until they shall respectively attain that age, and for each child which shall be, or shall successively arrive at, that age the sum of £100 per annum, for the maintenance and support of each such child until he or she shall attain the age of twenty-one years, if my said trustees shall think it expedient so to do. Provided always, and I hereby declare, that it shall be lawful for my said

trustees or trustee, if necessary in their or his opinion, to increase or decrease such allowance at their or his discretion, whether such child or children shall reside with or be supported by my said wife or not; and that it shall also be lawful for 'my said trustees or trustee for the time being, at their or his discretion, and with the consent of my said wife during her widowhood, to advance any sum or sums of money, not exceeding in the whole one-fourth part of the capital of the presumptive share of any such children of mine, in or towards the placing out or advancement in life, or otherwise for the benefit of such child or children, as my said trustees or trustee shall in their or his discretion think proper.' And subject to the said trusts the testator declared, that his trustees or trustee should stand possessed of the fund upon trust for all his children, who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain the age of twenty-five years, or marry under that age, in equal shares.

The will contained no provision for the maintenance of unmarried daughters of the testator during the interval between twenty-one and twenty-five.

The testator died on the 14th of September, 1875, leaving his wife, *Ann Breeds*, and nine children, namely, three sons, aged 23, 14, and 14; and six daughters, aged 23, 21, 18, 16, 15, and 11, who were unmarried and residing with their mother.

The testator's residuary estate was of the estimated value of £100,000, and was producing an income of about £4,000.

The petition was presented by the trustees under *Lord St. Leonards' Act*, praying the opinion of the Court as to whether they might lawfully and properly make an annual allowance for her maintenance and support to each of the daughters for the time being between the ages of twenty-one and twenty-five, and unmarried, and an annual allowance to Mrs. *Breeds* for the education of her infant daughters, in addition to the allowance for the maintenance and support of each such daughter payable under the will.

Chitty, Q.C., and *Gaselee*, for the Petitioners:—

According to the true construction of the will, each unmarried

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daughter takes a vested interest in her share of residue, payment only of herⁿ share being deferred until she attains twenty-five or marries: *Davies v. Fisher* (1). The testator has omitted to give maintenance during the interval. *Lord Cranworth's Act* (23 & 24 Vict. c. 145, s. 26) does not reach the case, as the persons requiring maintenance are of full age; but interest might be given by way of maintenance: *Chambers v. Goldwin* (2); *Martin v. Martin* (3); though it has been thought that this rule does not extend to adults whom the parent, if living, would be under no obligation to support: *Roper* on Legacies (4). At any rate, the difficulty may be got over by the trustees, with the consent of the widow, advancing out of capital the necessary sums for the purpose.

Upon the second question, they submitted that the trustees would be justified in increasing the allowance to the widow for each infant daughter, so as to meet the expenses of her education.

JESSEL, M.R.:—

I think the power of maintenance which, by sect. 26 of *Lord Cranworth's Act* (23 & 24 Vict. c. 145), is given to the trustees stops short at minority, and does not apply to the interval between twenty-one and twenty-five.

When the Court is administering the estate of the parent, it will, where the contingencies are equal, and the adult children, if any, consent, apply the income of the presumptive shares of the infant children for their maintenance. But this is a rule of the Court, and does not enable trustees so to apply the income where the estate is not under administration. If there were a suit to administer the estate, I am clear that I could do what is required; but the trustees cannot. I think, however, that with the consent of the mother, they may do it under the power of advancement; for the words “in or towards the placing out or advancement in life or otherwise for his or her benefit” are large words, as I recently decided in *Lowther v. Bentinck* (5).

Upon the second question, I am of opinion that the trustees

(1) 5 Beav. 201.

(2) 11 Ves. 1.

(3) Law Rep. 1 Eq. 369.

(4) 4th Ed. p. 1270.

(5) Law Rep. 19 Eq. 166.

may increase the allowance to Mrs. *Breeds* for each of her infant daughters, in order to meet the expenses of their education, for that is included in their maintenance and support.

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Solicitors: *Kingsford & Dorman*, agents for *Phillips & Cheesman, Hastings*.

In re WILCOCKS' SETTLEMENT.

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Absolute Interest in Personal Estate—Limitation over in case of Intestacy—Repugnancy.

Dec. 11.

A fund was settled in trust for *W.*, the illegitimate daughter of the settlor, for life, and in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers and provisions of the settlement, be undisposed of, or in the events which should happen would but for the proviso be held in trust for the Crown, or belong beneficially to the Crown, then and in every such case the estate, interest, or benefit should belong to and be held in trust for her father for life, and after his death, for her mother. *W.* having died intestate, the Crown claimed the fund:—

Held, that the fund vested absolutely in *W.* at her death, and that the gift over was repugnant and void; and consequently that the Crown was entitled to the fund.

BY an indenture dated the 28th of March, 1874, a sum of money belonging to *James Carrall Wilcocks* was settled upon trust for *Celia Wilcocks*, spinster, during her life, and after her decease, for her children by any marriage as therein mentioned; and it was declared that in case she should not marry, or in case there should be no issue of her in whom the trust fund should become absolutely vested, the trust fund and its accumulations should be held upon the following trusts, that is to say, if *Celia Wilcocks* should not at her death be under coverture, in trust for her, her executors, administrators, and assigns; but if she should at her death be under coverture (which event did not happen), then upon the trusts therein mentioned.

The indenture then continued: "And if any estate, interest, or benefit shall under the trusts, powers, and provisions of these presents be undisposed of, or in the event which shall happen would, but for this proviso, be held upon trust for the Crown, or belong beneficially to the Crown, or to the trustees or trustee

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of these presents, then, and in every such case, the said estate, interest, or benefit shall belong to, and be held in trust for, the said *James Carrall Wilcocks* and his assigns during his life, and after his decease, in trust for the said *Celia Douglas Wilcocks*, her executors, administrators, and assigns."

James Carrall Wilcocks died in April, 1874.

Celia Wilcocks, who was the daughter of *James Carrall Wilcocks* by his wife *Celia Douglas Wilcocks*, but was born before their marriage, and consequently illegitimate, died in August, 1875, intestate and without having been married, and letters of administration to her estate and effects were granted shortly afterwards to the nominee of the Crown.

The Crown having claimed the fund it was paid into Court by the trustees, and *Celia Douglas Wilcocks* presented a petition for payment of it out to herself.

Marten, Q.C., and *Warmington*, in support of the petition:—

The fund is claimed by the Crown as *bona vacantia*, but this it cannot be, by reason of the limitation over. It will be argued that as the gift to *Celia Wilcocks* became absolute on her decease, the limitation over is repugnant and void: *Holmes v. Godson* (1), overruling *Doe v. Glover* (2). But effect must be given to the intention, which manifestly was that *Celia Wilcocks* should take a life interest only, with a power of appointment by will, the fund being limited in default to the Petitioner and her late husband.

Rigby, for the Crown, was not called upon.

Ince, Q.C., for the trustees of the will.

JESSEL, M.R.:—

This is an extremely simple gift. It is an absolute gift, in a particular event, to a lady who happened to be illegitimate. The event happened, she died a spinster, and consequently was absolutely entitled to the property at her death. Immediately following the absolute gift there is this singular proviso:—[His Lordship read the clause set out above, and continued:—] It is a clause purporting to deal with property of Miss *Wilcocks* which would but for the proviso be held in trust for the Crown, or belong beneficially to

(1) 8 D. M. & G. 152. *J. H. S.* (2) 1 C. B. 448.

the Crown. But it is not the case that the fund would be held in trust for the Crown but for that proviso. It was the lady's absolute property, and could only be held in trust for the Crown in case she happened to die intestate. This proviso therefore amounts to this—that the fund is limited over in the event of her dying intestate. The question I have to decide is whether such a limitation can be supported. I think it cannot. The law of *England* has from the earliest times prohibited the introduction of new modes of devolution of property by operation of law. Of course a man can direct his property to go according to any series of limitations that he pleases, but he cannot create a new mode of devolution by operation of law. If there be a gift in fee, for instance, the donor cannot say that in the event of the donee dying intestate, the estate shall descend not to his eldest but to his youngest son. In *Ross v. Ross* (1) Sir *Thomas Plumer* said: "The question, I think, is, whether this will vests the absolute property of the legacy in the legatee. If it do give the absolute property, the right of disposing of it, or its devolution upon his representatives, would follow as a matter of course." That is, if a man give the property itself, it must devolve according to law, if not disposed of by the donee in his lifetime. A similar point arose in *Holmes v. Godson* (2), where Lord Justice *Turner* said: "The law has said that if a man dies intestate, the real estate shall go to the heir and the personal estate to the next of kin"—meaning the person, whoever he may be, who takes personal estate in the event of intestacy—"and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void." That is, a man cannot give property absolutely, and at the same time say it shall not devolve according to law.

I therefore decide that the proviso is void as repugnant to law, and as a consequence, that the Crown is entitled to the fund. The proper form of order will be, that the Court being of opinion that Miss *Wilcocks* was absolutely entitled at her decease, order the fund to be paid to her legal personal representative.

Solicitors: *Yarde & Loader*; *The Solicitor to the Treasury*.

(1) 1 Jac. & W. 154.

(2) 8 D. M. & G. 152, 165.

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Dec. 18.

*In re COTTON.**Infant—Maintenance—Contingent Interest—23 & 24 Vict. c. 145, s. 26.*

Trustees may, under 23 & 24 Vict. c. 145, s. 26, apply for or towards the maintenance of an infant the income of property held on trust for the infant contingently on attaining the age of twenty-one years.

Where a fund was bequeathed upon trust for all the children of *A.* who should attain twenty-one in equal shares, and if there should be but one such child, then for that child, and *A.* died leaving one infant child:—

Held, that the income of the fund might be applied in the maintenance of the child.

ELIZA COTTON, by her will, dated the 11th of March, 1870, gave certain legacies, and bequeathed the residue of her estate to trustees upon trust as to one moiety thereof to pay the annual income to her niece, *Jane Jackman*, during her life for her separate use, and after her decease to stand possessed of such moiety, and the income to arise therefrom, upon trust for all her children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares; and if there should be but one such child, then upon trust as to the whole of such moiety for that child; and if no child should live to attain a vested interest, then over. The will contained no power of maintenance.

The testatrix died in May, 1870. Her residuary estate was of the value of £3500, and was invested on mortgage producing an annual income of £170.

Jane Jackman died in August, 1875, having had one child only, a daughter, who was of the age of seven years at the date of the petition.

George Jackman, the father of the infant, being in such circumstances that it would be impossible for him to bring up and educate her unless some allowance was made to him by the trustees for her maintenance and education out of the income of her expectant share of the residue, a petition was presented by the trustees, under *Lord St. Leonards' Act*, praying the opinion of the Court as to whether they would be justified in making such allowance to her father.

506 D. 839, 840
542,
1964 D 309

Jason Smith, for the Petitioners :—

The petition is presented in consequence of doubts which have been expressed, but which it is submitted have no foundation, as to sect. 26 of *Lord Cranworth's Act* (23 & 24 Vict. c. 145) applying to cases like the present, where the income of the expectant share is not vested: *Lewin on Trusts* (1); *Davidson's Prec. Conv.* (2).

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JESSEL, M.R. :—

With every respect for the learned gentlemen of whose opinions I have been told, I must say that they have done their best to repeal this section. *Lord Cranworth's Act* (23 & 24 Vict. c. 145) really extends to all infants the benefit which, in *Chambers v. Goldwin* (3) and other cases, the Court had extended to infants for whom a provision had been made on the contingency of their attaining twenty-one by a parent or a person standing *in loco parentis*. In cases where the person making the provision was a parent or stood *in loco parentis*, the Court held that the attaining of twenty-one was put in simply to fix the time of payment, and not to deprive the child of the benefit in the meantime, and accordingly it gave the income by way of maintenance. But it declined to extend the rule to other cases, and, consequently, the Legislature intervened and enacted that in all cases where property is held in trust for an infant, either absolutely, or contingently on his attaining twenty-one, it shall be lawful for the trustees, at their sole discretion, to pay to the guardians, if any, of such infant, or otherwise to apply for or towards the maintenance and education of such infant, the whole or any part of the income to which such infant may be entitled of such property. The difficulty has arisen on the word "entitled," which is said to mean "indefeasibly entitled"; and I agree that "may be or become entitled" would have satisfied the conveyancers better. When property is held on trust for an infant contingently on his attaining twenty-one, the infant is not entitled, strictly speaking, to the income any more than to the capital. If he attains that age he will get both. In fact he is entitled to both, subject to the contingency of his dying under twenty-one. I am clearly of

(1) 5th Ed. p. 419.

(2) 3rd Ed. vol. iii. p. 177.

(3) 11 Ves. 1.

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opinion, therefore, that the trustees may apply a moiety of the income for the maintenance of the infant, and may pay it to her father, for I think the expression "guardians" in the section includes the father, as guardian by nature.

Solicitors: *R. S. Taylor & Son.*

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BURTON v. NEWBERY.

[1861 B. 138.]

Will—Codicil—Gift to attesting Witnesses—Subsequent Codicil referring to Will—Republication.

A codicil, which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil.

Gordon v. Lord Reay (1) dissented from and not followed.

A testator made a will (dated before the *Wills Act*), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom *A.* and *B.* were two. He made a first codicil (dated after the *Wills Act*), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by *A.* and *B.* He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—

Held, that the second codicil did not operate as a republication of the first codicil; that the gifts to *A.* and *B.* of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between *A.* and *B.* and the other ten residuary legatees.

JOSHUA MALDEN, by his will, dated the 7th of December, 1837, and duly attested, devised certain real estate, specifically described, and all and singular other his messuages, lands, tenements, hereditaments, and real estate to *George Newbery* and *John Ryland*, and their heirs upon trust to receive the rents and profits thereof during the lives of his daughters, *Elizabeth Burton* and *Mary Morton*, and apply such rents upon the trusts therein mentioned.

(1) 5 Sim. 274.

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and from and after the decease of *Elizabeth Burton* and *Mary Morton* upon trust to sell the same, and hold the proceeds of sale upon the trusts of his (the testator's) residuary personal estate; and the testator thereby bequeathed his residuary personal estate upon certain trusts during the lives of *Elizabeth Burton* and *Mary Morton*; and after their death he directed the same to be equally divided between such of his thirteen grandchildren therein named (two of whom were *William Burton* and *Ann Burton*) as should being grandsons attain twenty-one, or being granddaughters attain that age or marry.

By a codicil dated the 12th of October, 1838, and attested by *Elizabeth Burton*, *William Burton*, and *Ann Burton*, the testator directed that the rents of certain real estate purchased by him on the 13th of July, 1838, and the 10th of October, 1838, should be disposed of in the same manner as the rents of all his other estates; and he further desired that his executors should sell such real estate, and dispose of the proceeds in the same manner as the moneys arising from all his other estates.

The testator made another codicil, dated the 1st of April, 1839, and in the following terms:—"This is a codicil to my last will dated 7 December, 1837: and I hereby give and bequeath unto my daughter *Elizabeth Burton* £600, which I desire my executors to pay to her within twenty-four months after my decease." This codicil was duly attested by two witnesses.

The testator died shortly after the date of the last codicil. Of the thirteen grandchildren named in the will, twelve (including *William Burton* and *Ann Burton*) attained twenty-one.

The suit was instituted for the administration of the trusts of the testator's will, and now came on to be heard on further consideration. *Elizabeth Burton* and *Mary Morton* were both dead; the testator's real estate had all been sold; and the question was, whether the testator had effectually devised to *William Burton* and *Ann Burton* two twelfth shares of the proceeds of the property comprised in the codicil of the 12th of October, 1838.

Waller, Q.C., and *Hamilton Humphreys*, for *William Burton* and *Ann Burton* :—

The codicil of the 1st of April, 1839, is a republication of the

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will, including the prior codicil of the 12th of October, 1838, which must be taken to be validly attested for all purposes. The law is thus laid down in *Jarman* on Wills (1): "In applying the doctrine that a reference in a codicil to the prior of two wills as the actual will of the testator sets it up against a posterior will, it is necessary to bear in mind that every codicil is a constituent part of the will to which it belongs; for in a general and comprehensive sense, a will consists of the aggregate contents of all the papers through which it is dispersed; and, therefore, where a testator in a codicil refers to and confirms a revoked will, it is not necessarily to be inferred that he means to set up the will (using the word in its special and more restricted sense) in contradistinction to, and in exclusion of, any intermediate codicil or codicils which he may have engrafted on it. He is rather to be considered as confirming the will with every codicil which may belong to it." In support of this proposition the author cites *Crosbie v. MacDoual* (2) and *Gordon v. Lord Reay* (3), the latter of which cases is precisely in point here; and the doctrine there laid down is supported by *Pigott v. Waller* (4) and *Anderson v. Anderson* (5). Moreover, the first codicil gives by reference to the will, and the other legatees can take no greater share in the property devised by the codicil than they would have done if it had been devised by the will; they cannot take any benefit under the will without giving effect to all the dispositions of the testator.

Chitty, Q.C., and *Everitt*, for some of the other grandchildren, referred to *Aaron v. Aaron* (6); *Winter v. Winter* (7); *Farrer v. St. Catharine's College* (8); *In the Goods of Reynolds* (9); and submitted that the gift to *William Burton* and *Ann Burton* of two twelfth shares of the property specifically devised by the first codicil failed; and that these shares must fall into the residue and be divided in twelfths between *William Burton*, *Ann Burton*, and the other ten grandchildren who attained twenty-one.

(1) 3rd Ed. vol. i. p. 175.

(2) 4 Ves. 610.

(3) 5 Sim. 274.

(4) 7 Ves. 98.

(5) Law Rep. 13 Eq. 381.

(6) 3 De G. & Sm. 475.

(7) 5 Hare, 306.

(8) Law Rep. 16 Eq. 19.

(9) Law Rep. 3 P. & M. 35.

Southgate, Q.C., Shebbeare, Jolliffe, Stallard, Whitehorne, and F. W. Stone, appeared for other parties.

JESSEL, M.R. :—

The case I have before me is one of some little singularity, and perhaps of some novelty, and it compels me to consider some of the prior authorities, and to say how far they appear to me to be consistent with principle. The 15th section of the *Wills Act* in effect makes void any gift by a testamentary instrument to attesting witnesses and certain other persons, such as the wives and husbands of attesting witnesses ; but it does not in any other way affect the validity of the testamentary disposition. If, therefore, a testator makes a testamentary disposition containing a gift to the attesting witness, the attesting witness takes nothing under it.

This particular testator having made his will on the 7th of December, 1837, before the *Wills Act*, made a first codicil, which bears date the 12th of October, 1838, and thereby gave benefits to the attesting witnesses. It is clear, if nothing more had been done, that those benefits would not have been taken by them. He then made a second codicil, not, however, calling it a second codicil, which bears date the 1st of April, 1839, and it is in these terms :—[His Lordship read it as set out above.] The first point raised on behalf of the claimants is this : they say that the effect of this second codicil is equivalent to a re-execution of the first codicil, in other words, that the second codicil is not only equivalent to the re-execution of the will standing alone, but of the will plus the first codicil, and the question I have to decide is, whether that is the effect of the second codicil. I wish I could say that the law on the subject was clear ; that it was perfectly consistent with principle ; and that the authorities were not to a great extent conflicting. I cannot say so ; but I can say what is my opinion of the law derived from those conflicting authorities, and having regard to principle.

Now it appears to me that any testamentary instrument properly attested may incorporate into it by reference as a part of the testamentary instrument any prior writing, whether such prior writing be attested or not, and that if the incorporation is made

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in such a manner that the Court can find out from the properly attested instrument what is the prior instrument intended to be referred to, then the prior instrument becomes a part of the testamentary instrument to all intents and purposes.

That I take to be the principle, and the question is whether such reference is necessary. I think it is, and as I read the judgment of Baron *Bayley*, in the case of *Doe v. Evans* (1), he puts the law very much in the way I have stated. The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet, and the learned Judge says: "Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up." In other words, the mere fact of its being a codicil alone will not do; it must refer in some shape or another to the instrument which is set up. In the case of *Aaron v. Aaron* (2), which came before Vice-Chancellor *Knight Bruce*, he recognised the authority of *Doe v. Evans*. Whether he also intended to recognise the authority of *Gordon v. Lord Reay* (3) I am not sure. After reading at length the judgment of Baron *Bayley* in *Doe v. Evans*, he says (4): "Now, it can make no difference whether the codicil be written on the same paper with the will or written at a subsequent period or not. Here a codicil is referred to, and there is no dispute what the instrument was." Then he reads the codicil at full length, and you find that it begins thus: "Whereas I, *John Aaron*, have made and duly executed my last will and testament in writing, bearing date the 23rd day of August, 1828, and also a codicil annexed thereto, bearing date the 21st of May, 1831." Then he says, "It is perfectly clear, in my opinion, what the instrument here mentioned is." Of course; it was described as a codicil. Then he goes on, "The intention of the second codicil, as collected from the whole of it, was to confirm the first codicil. That is done by an instrument duly attested. Now, whatever I might have thought of this question independently of the case of *Gordon v. Lord Reay*, and the observations of *Bayley*, B., in the case in the Exchequer, I must, if I am to decide myself without having the opinion of a Court of Law, say

(1) 1 Cr. & M. 42.

(3) 5 Sim. 274.

(2) 3 De G. & Sm. 475.

(4) 3 De G. & Sm. 479.

that the effect of the will and second codicil was to place the first codicil in the same situation as if it had been attested by three witnesses." He does not say there whether he does or does not approve of *Gordon v. Lord Reay* (1); but these two cases of *Doe v. Evans* (2) and *Aaron v. Aaron* (3) are entirely in accordance with what I consider to be the principle, which is, that the setting up instrument must contain a distinct reference to the prior writing, so as to shew that the testator intends that prior writing to be a part of his testamentary disposition.

Gordon v. Lord Reay is a case very difficult to deal with. In argument, undoubtedly the point was taken by Sir *Edward Sugden* for the Defendants. He says that an instrument duly attested can only republish an instrument not duly attested to which it expressly refers.

In *Gordon v. Lord Reay* there was a codicil, which, as the law then stood, was perfectly valid as regarded personal estate; but it was not valid as regarded real estate for want of due attestation. Then there was a second codicil, which was in these terms: "Whereas I have in and by my last will and testament, bearing date the 17th of August, 1812, made several provisions and bequests in favour of *Susan Harriet Hope*," &c., "now I do hereby confirm such bequests and provisions," "and I do hereby ratify and confirm this by my hand and seal, dated the 13th of August, 1818," and there is nothing more. A reference is made to provisions made by the will, with the date of it, and a confirmation is made of those provisions. The testator had also made substantial provisions for the lady by the first codicil, but I confess I cannot find, on the face of the second codicil, any reference whatever to the first codicil, nor can I find any reference to any will which would include the codicil, because the only will referred to is a will bearing date the 17th of August, 1812, which was the date of the original instrument, and the codicil was dated the 8th of April, 1814. Therefore it is not (as was put to me in argument) the case of a man saying simply "I confirm my will," and it being held that the term "will" included every testamentary disposition, whether contained in a thing called a will as distinct from a codicil, or in

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(1) 5 Sim. 274.

(2) 1 Cr. & M. 42.

(3) 3 De G. & Sm. 475.

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a thing called a will, being a will plus several codicils. The only reference was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date. I am obliged to say this, because I admit that the decision was the other way. Unfortunately, we have no reasons given. The judgment of the Vice-Chancellor is in these terms: "My opinion is that the second codicil does republish the first. The first codicil is part of the will." [It was part of the will for the purpose of the personal estate, but not part of the will for the only purpose for which the Vice-Chancellor had to consider it—that is as regarding real estate.] "And if the second codicil is a republication of the will, it is a republication of everything which is part of the will. The second codicil does refer to the will; it ratifies and confirms the will, and everything that is part of it." It does appear to me that that is a fallacy, that where you describe a will by its date you do not describe the subsequent codicil as being included in that will. It may well be, that where you describe a will generally, without date, and say, "I confirm my will," you might interpret the word "will" as including the whole of the testamentary disposition; but it does appear to me that that was not the case in *Gordon v. Lord Reay* (1), and I cite, in reference to this point, the observations made in the case of *Crosbie v. MacDoual* (2), and those made by Lord Selborne in the recent case of *Farrer v. St. Catharine's College* (3). They both go to this, that a mere reference to an instrument with a date is not a reference to the subsequent instrument. The point in *Crosbie v. MacDoual* was this: The testator made a will; he then made several codicils, the fourth of which revoked certain annuities given by the will, and then, last of all, he made a codicil confirming the will, but not all the codicils, and the question was whether he had revived the gift which had been revoked by the intermediate codicil. It was held he had not: and the then Master of the Rolls distinguished the case from the case of *Lord Walpole v. Lord Orford* (4), where a man having made two wills, and unfortunately not having destroyed the first, made a codicil, and the transcriber having the first will before him, as well as the second, by mistake

(1) 5 Sim. 274.

(2) 4 Ves. 610.

(3) Law Rep. 16 Eq. 19.

(4) 3 Ves. 402.

(of which they would not allow evidence to be given), confirmed the first will, which was inconsistent with and had been revoked by the second; and it was held that the confirmation of the first will, though it had been revoked, set it up again. It was a writing which, though revoked and good for nothing, was as much incorporated by the codicil as though it had been written out again in words, and consequently it revoked the intermediate and inconsistent will. But, as pointed out by the Master of the Rolls, that does not apply to a will and codicil followed by a second codicil inconsistent with the prior codicil; there is no occasion in such a case to assume that you do revoke the intermediate codicil. So in a case where you make a will with subsequent codicils, you may intend merely to revoke the will, and leave the codicils standing, which was the decision in *Farrer v. St. Catharine's College* (1). There, the argument was pressed that the revocation of a will, being the revocation of everything which is part of it, must revoke all the codicils. The answer was, you do not revoke the will in that sense, but you revoke an instrument called a will of a certain date; therefore the revocation does not go beyond that. I must say it does not appear to me that the case of *Gordon v. Lord Reay* (2) was decided according to principle, and that the true principle was that which was laid down by Baron Bayley in *Doe v. Evans* (3), which has been certainly followed, whereas I am not able to find that the case of *Gordon v. Lord Reay*, though quoted, has ever been followed at all.

Then there is a second point, which is this: The codicil gives certain after-acquired lands substantially on the same trusts on which the testator had given the residue of his real estate. According to the doctrine now established by *Christie v. Gosling* (4) you are to read the words referred to as if they were incorporated in the instrument. The consequence would be that the attesting witness would take a share of the money to arise from the sale of the lands; but then that share is forfeited by the law. What becomes of it? It falls into the residue. Any lapsed or void gift falls into the residue, and consequently the shares of the attesting witnesses will be divided among all the residuary legatees. But

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(1) Law Rep. 16 Eq. 19.

(2) 5 Sim. 274.

(3) 1 Cr. & M. 42.

(4) Law Rep. 1 H. L. 279.

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it was said that the residuary legatees cannot take under the first codicil, which directs the money to be divided in accordance with the provisions of the will without carrying out all these provisions. That appears to me to be a fallacy. It is not, in fact, a case of election at all, they take simply what is given to them by the instrument. The dispositions of that instrument are not effectual to the extent to which a share of the property is given to the attesting witness, not by reason of the terms of the will or codicil, but by reason of the law which annuls the gift. You have, therefore, to look, not at the meaning of the codicil, but to the effect of the codicil with the addition of the statutory enactment which annuls a portion of its effect, and you have to read it in exactly the same way as if these persons had been excepted from the portion of the will incorporated by reference, consequently they can by no possibility be held to take anything under such words of reference. Therefore I hold that their shares are simply void gifts and fall into the residue, and are divisible among them as well as the other residuary legatees.

Solicitors: *Johnson & Weatheralls; Rhodes & Son.*

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*Old Administration Suit—Deficient Estate—Funds subsequently coming in—
Vested Rights of Original Creditors—Apportionment of Fund.*

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Where, in the case of a deficient estate, the creditors have been ascertained, and the available assets divided amongst them, and at a subsequent period further funds come in belonging to the estate, and some only of the creditors or their representatives appear in answer to advertisements, those who so appear are only entitled to the proportions of the fund distributable which their debts bear to the entire liabilities of the estate, and the remainder must be retained to meet any future claims by the other creditors.

affirmed 4th D. 757ca
THIS was a petition seeking for distribution of certain funds standing in Court and now claimed by the representatives of some of the persons who were creditors of one *Charles Pitfield*, who died in the year 1740.

Shortly after the death of *Charles Pitfield* the present suit was instituted for the administration of his estate, and a decree was made in due course, and advertisements issued for creditors, and the creditors and the amounts of their debts duly found. By an order of the 21st of July, 1792, and a report of the 9th of August, 1792, made in pursuance of the order, the funds then in Court were apportioned amongst the creditors so found, but some of those who were entitled to apportioned parts never took their dividends out of Court, and there remained unclaimed the sum of £425 10s. The funds then distributable were insufficient to pay the creditors in full.

In or not long previously to the year 1867 a sum of £3146 16s. 3d., representing one-fourth of two shares in the *Shadwell Waterworks Company*, which had been then dissolved, was paid into Court to the credit of a suit of *Sturt v. Hervey*, "the real estate of *Charles Pitfield*," and by an order, dated the 10th of July, 1867, made upon a petition, an inquiry was directed as to who was or were those beneficially interested in this fund, and in the sum of £425 10s., and the two funds were ordered to be invested, and advertisements were issued for the creditors of *Charles Pitfield*.

By the Chief Clerk's certificate, dated the 5th of April, 1875, it was in effect found that these funds were applicable to the

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payment in full of the specialty debts of *Charles Pitfield*, and an apportioned part of his simple contract debts, and that the only claim brought in was that of the present Petitioners, who claimed, in respect of principal and interest, the sum of £2788 5s. 8d., and that there was no claim made in respect of another creditor, whose debts amounted, together with interest, to £1042 16s. 11d.

The petition asked that the funds in Court might, after payment of costs, be applied in discharge of the Petitioners' debt, and that any balance might be carried over to a separate account.

Glasse, Q.C., and Murray, for the Petitioners:—

The rule has been established by *Wild v. Banning* (1), that in the case of an assignment deed for the benefit of creditors any unclaimed dividends belong to those creditors who appear; and a long series of cases has decided, on the same principle, that in cases like the present, where a fund has become distributable after a long period, and only some of the parties who would have been entitled come in and claim, those who do come in are entitled to take the entire fund, or as much as may be necessary to pay their claims in full. In 1865, in *Re Cunningham's Trusts*, where a reversionary fund fell in and a petition was presented by one of several creditors who had previously proved against an estate, Lord *Hatherley*, then Vice-Chancellor *Wood*, directed, in the first instance, an inquiry as to who were entitled, and afterwards made a final order distributing the fund exclusively amongst those who came and proved their claims.

The late Master of the Rolls followed the same practice in 1868 in *Horncastle v. Sewell*, and again, in 1871, in *Smith v. Smith*, and Vice-Chancellor *Stuart* took the same course in June, 1870, in *Hughes v. Lyon*. In *Bickley v. Penny*, where neither creditors nor specific legatees made any claim in answer to the advertisement, the Master of the Rolls, by an order of the 2nd of March, 1866, distributed the fund amongst residuary legatees.

The practice of the Court was uniform in these cases till a case of *Alderson v. Petrie* came before Lord *Selborne*, sitting for the Master of the Rolls, in June 1873, and he held that all the creditors whose debts had been found had a vested interest in their

(1) Law Rep. 2 Eq. 577.

proportion of any fund which subsequently became distributable, and that only the proportion of the fund which the debts of those who claimed payment at the subsequent period bore to the entire debts could be paid out, and the rest must be retained in Court. But this isolated decision cannot be treated as upsetting a rule established by so long a series of authorities.

The rule is not newly established. It was acted upon in *Williamson v. Naylor* (1), and was the rule in bankruptcy till altered by sect. 116 of the *Bankruptcy Act*, 1869.

J. Pearson, Q.C. (*Pemberton* with him), for the official solicitor to the suitors' fund, commenced his argument, but was stopped by the Court.

Higgins, Q.C., *Lovell*, and *Udal*, who appeared for the representatives of *Charles Pitfield*, and raised some questions as to the mode in which the funds already distributed had been apportioned as between the principal and interest due upon the debts, were not heard.

MALINS, V.C. :—

I think I had better state the view I take of the case. The point raised on this petition is a very important one, and affects the practice of the Court, because a great number of these claims of long standing are brought forward. In the present case very large funds have rather unexpectedly come into Court, of which a considerable portion is found to belong to the estate of *Charles Pitfield*, who died as long ago as the year 1740. There was a suit for the administration of his estate. The usual advertisements for creditors were issued, and in 1792 it was found who were the creditors and what was the amount of their debts; and all the funds available were distributed, except a small sum of between £400 and £500, which was apportioned but not taken out of Court. That is how the case was dealt with in 1792, and probably if it had not been for the accretion to the estate by the sale of the *Shadwell Waterworks* that sum would have remained for ever unnoticed, and would ultimately have gone towards paying

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(1) 3 Y. & C. (Ex.) 208.

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the National Debt. But the fund representing two shares in the *Shadwell Waterworks* having been paid into Court, a petition was presented before me, and I made the usual reference to Chambers to ascertain who was entitled to the money. It has now been found that a considerable portion of the fund belongs to the estate of *Charles Pitfield*. His creditors have not been satisfied, and I suppose that if they had all now come forward it would have taken the whole fund to pay his debts. But it happens that, advertisements having been again issued, a proportion only, whom I will assume to be two out of twenty of the creditors, have come forward, and it is contended on their behalf that no creditor except those who have come forward is to be paid.

Undoubtedly it is the practice of the Court that where advertisements for creditors are issued, those only who claim are treated as creditors, and if twenty claim, the whole estate is, if necessary, distributed amongst them; and if another person comes in after the distribution, he must obtain payment, if he can, from the creditors who have received the whole. In this case the creditors were found before 1792, and they were the *cestuis que trust* of the distributable funds, whatever they were or whatever they might become. It happens that the *Shadwell Waterworks* fund did not come in till about fifty or sixty years later, but when it did come in it was just as much applicable to pay the debts as if it had been originally part of the personal estate. It was, at any rate, subject to the same trusts for the payment of the creditors.

Authorities have been cited which shew that it has been long the settled practice of the Court, sanctioned by many eminent Judges, including the Vice-Chancellor *Wood*, the Vice-Chancellor *Stuart*, and Lord *Romilly*, to distribute the fund exclusively amongst those who came in and claimed at the subsequent period. I confess that, when the case was opened last week, it did strike me as a reasonable course that those who claimed should be paid in full if there are funds enough to pay them, and that those who do not come should be considered as having abandoned their claim. But when I find that it does not appear that any case before *Alderson v. Petrie* was fully argued, and that in the earlier cases the principle upon which they were decided appears to have been acquiesced in and assumed to be settled; and that when *Alderson*

v. *Petrie* came before Lord *Selborne*, sitting for the Master of the Rolls, it was fully argued and warmly contested, and that Lord *Selborne* came to the conclusion that the rule ought to be that those who came in and claimed at the subsequent period should only have such an amount as was a fair apportionment on their own debts, I think it more fitting and more respectful on my part not to depart from that decision. I could not do so unless very clearly satisfied that the rule laid down ought not to be maintained; but, having heard only the argument in favour of the creditors who have come in, I am bound to say that my judgment concurs with that of Lord *Selborne*. Therefore I cannot decide otherwise than as he has done. The case will probably be appealed, and the Court of Appeal will settle the rule finally one way or the other. I follow that decision, that the creditors who have proved will only receive their rateable dividend on the amount of their debt.

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Solicitors: *Ewbank & Partington*; *Meynell & Pemberton*; *Lovell, Son, & Pitfield*.

In re TAL Y DRWS SLATE COMPANY.

MACKLEY'S CASE.

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Nov. 20.

Contributory—Memorandum of Association—No Shares available for Allotment.

The memorandum of association of a company was subscribed by *M.*, but he took no further part in the management, and was never treated as a shareholder. His name never appeared on the register of members of the company, and the entire share capital was allotted to other persons:—

Held, that he was not liable as a contributory.

THIS was a summons to remove the name of Mrs. *Amelia Mackley* from the list of contributories of the *Tal y Drws Slate Company, Limited*, she having been placed on the list for fifty shares as the executrix of her late husband, *Thomas Cole Mackley*.

The company was formed in the year 1863, under the *Companies Act*, 1862, by the registration of a memorandum and articles of association, Mr. *Mackley* having subscribed the former for fifty

522 D 52
122 D 198

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shares. He had been induced to take this step by being informed by the promoter of the company that an intimate friend of his had promised to become a director, and finding that this information was incorrect, he had at once requested that his name might be withdrawn from the company, but took no active steps with this object.

He never took any part in the management of the company, and the whole of the share capital was allotted to other persons, and there were no shares which could have been put in his name. No steps were ever taken to put his name on the register of members, and he never paid any deposit or calls on any shares in the company.

The shares were of £10 each. The company continued to exist for some years, and on the 18th of March, 1868, eighty-nine shares were forfeited for non-payment of calls. These shares had been partially paid up. They were never re-allotted. Calls had been made from time to time for the full nominal amount of the shares, and all except the eighty-nine forfeited shares were paid up in full.

Mr. *Mackley* died on the 6th of July, 1869, leaving his widow, the present applicant, his executrix, and the company ultimately went into voluntary liquidation, and on the 24th of April, 1874, the liquidation was ordered to be continued under the supervision of the Court. The liquidator then placed Mrs. *Mackley* on the list as Mr. *Mackley's* executrix, in respect of the fifty shares for which he had subscribed the memorandum of association, and the present summons was taken out for the purpose of having her name removed from the list.

Glasse, Q.C., and Dixon, for Mrs. Mackley:—

It is admitted that Mr. *Mackley's* name never appeared on the list of shareholders, and that there is not a scrap of paper making him out to be a shareholder. No creditor and no shareholder could have been deceived or misled, inasmuch as Mr. *Mackley's* name did not appear in any list furnished to the Registrar of Joint Stock Companies, and there was no want of *bona fides* on his part: *Hartley's Case* (1). If his name were kept on the list, the effect

(1) Law Rep. 10 Ch. 157.

would be to allow the liquidator to increase the capital of the company.

Higgins, Q.C., and *W. D. Griffith*, for the official liquidator:—

Hartley's Case was not a case of signing the memorandum of association, and is not an authority for the present application. Lapse of time does not affect the case, and, but for the fact of all the shares having been allotted, there would be no answer to the claim of the liquidator; and *Levick's Case* (1) would be exactly in point. Nothing has since occurred to diminish the force of the remark made in the judgment in that case, and on which the decision proceeded, that "no case has been cited in which a person who has signed the memorandum of association has ever been held not to be a contributory." The only way to get rid of a liability incurred by subscribing the memorandum of association of a company is by taking and transferring the shares: *Sidney's Case* (2). It was his duty to see that the shares were allotted to him, and he cannot be allowed to gain anything by a violation of his duty: *Evans's Case* (3). He was originally liable, and has done nothing to discharge his liability: *Hall's Case* (4); *Karuth's Case* (5).

MALINS, V.C., after referring to the facts of the case, continued:—

Considering that, except by the signatures to the memorandum of association, Mr. *Mackley's* name was never connected with the company, and that he was never on the register of shareholders, it is quite clear that no one could ever associate him with it in any way. No creditor could ever have given any credit to the company on the faith of his name. It is also impossible that the shareholders *inter se* could have any right to call upon Mr. *Mackley* to contribute towards paying the debts.

Then it is said that once having signed the memorandum he is liable for the shares for which he has signed, and cannot escape from the liability except by accepting the shares and having them formally transferred. It is said that this has been decided

(1) 40 L. J. (Ch.) 180. *WM(70) 271*. (3) Law Rep. 2 Ch. 427.

(2) Law Rep. 13 Eq. 228.

(4) Ibid. 5 Ch. 707.

(5) Law Rep. 20 Eq. 506.

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in several cases, and *Levick's Case* (1) and *Sidney's Case* (2) have been cited in support of this contention. But this case, like others, must be decided by reference to the surrounding circumstances.

Now it has occurred to me that when it appeared that there were no shares which Mr. *Mackley* could have had if he had wanted them, the company were not in a position to say that they would continue to hold him liable for the shares for which he had signed.

It is true that this is a new case, but though the decision of no Judge has been actually given upon facts like the present, it is evident that the opinion of the Lords Justices in *Evans's Case* (3) would have accorded with the view I have now taken if the point had arisen in that case. In that case Mr. *Evans* had subscribed the memorandum of association of the company for ten shares, and had for a short time acted as a director. Afterwards other directors were appointed, and he never had anything more to do with the company. No shares were ever allotted to him. But, though all the shares were in the first instance allotted to other persons, it appeared that the allotment of some of them had never been confirmed in the manner required by the articles of association, and consequently there were in fact shares which might have been allotted to Mr. *Evans*. The Lord Justice *Turner*, in giving judgment, says (4): "If indeed all the shares had been allotted to others, a question might have arisen; but 4000 shares only were allotted subject to confirmation, and this never took place; therefore there are still 4000 shares not allotted, and, for the shares in respect of which he must be considered allottee, he must be placed upon the list."

That remark exactly fits the present case. The Lord Justice Lord *Cairns* also says (5): "It is said that the shares which Mr. *Evans* would have had, were allotted to other people, but it seems that the allotment was not final, and that there were left at all times shares sufficient to answer the right of Mr. *Evans*." Can

(1) 40 L. J. (Ch.) 180. *WM 70* 271 (3) Law Rep. 10 Ch. 157.

(2) Law Rep. 13 Eq. 228.

(4) Ibid. 2 Ch. 429.

(5) Law Rep. 2 Ch. 430.

anything be more clear than that if there had been no shares he would have been relieved from liability?

In the present case no one has been deceived. It cannot be said that any creditor has given credit to the company because Mr. *Mackley* subscribed the memorandum of association in 1863. And there is no equity on the part of any contributory. If the shareholders intended to look to Mr. *Mackley*, they should not have allotted the shares to other persons. I am of opinion that this is an unjust demand as regards both creditors and contributories. The costs will be paid by the liquidator, and he will be at liberty to retain them out of the estate. If the estate is insufficient there will be liberty to apply.

Solicitors: *George Brown ; Sorrell & Son.*

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In re BESSEMER STEEL AND ORDNANCE COMPANY.

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Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104)—*Sanction of Meeting*
—Majority of three-fourths present.

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Under the 2nd section of the *Companies Arrangement Act*, 1870, it is sufficient that the sanction of three-fourths in value of the creditors present at the meeting should be given to any proposed arrangement.

6ck D. 629.
10ck D. 70

THE *Bessemer Steel and Ordnance Company* was ordered to be wound up compulsorily on the 24th of July, 1874; and in the next month Mr. *Kemp* and Mr. *Aylmer* were appointed the official liquidators. The total amount of the debts of the company was about £170,000, of which some were admitted and others disputed. Among the admitted creditors was a Mr. *Dixon*, one of the directors of the company, for a sum of £44,275.

In the month of June, 1875, the official liquidators, on behalf of the company, entered into an agreement with Mr. *Dixon* for the sale to him of the assets of the company, in consideration of his paying the costs of the winding-up, and a composition of 5s. 3d. in the pound to the other creditors of the company in discharge of their several claims.

On the 24th of September last a meeting of the creditors of the

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All the creditors then present at the meeting (with the exception of one who claimed £4 10s. 1d. in full for poor rates) approved the proposed arrangement with Mr. *Dixon*, and desired that it might be sanctioned by this Court. The only persons who objected to the arrangement were the lessors of the company's premises at *Greenwich*, who, however, had since withdrawn their objection, and the Messrs. *Payne's Fire Brick Company*, who were creditors for £113 17s.

The official liquidator, deeming the proposed arrangement with Mr. *Dixon* to be beneficial to the company, presented a petition under the *Joint Stock Companies Arrangement Act*, 1870 (33 & 34 Vict. c. 104), praying for an order confirming the agreement.

*Glasse*, Q.C., and *Whitehorne*, for the Petitioner :—

The only question is, whether the agreement has been approved by the proper number of creditors required by the Act. The 2nd section of the Act provided that the meeting of the company's creditors may approve and sanction the agreement :—" If a majority in number representing three-fourths in value of such creditors, or class of creditors, present either in person or by proxy at such meeting, shall agree to the arrangement or compromise, and the agreement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors (as the case might be), and also on the liquidators and contributories of the company." The question, therefore, is whether "the majority representing three-fourths in value" is to be the majority of all the creditors, in which case the £120,002 12s. 3d. does not constitute three-fourths of £170,000, or the majority representing that value of the creditors present at the meeting? In the latter case, all the creditors but one, for a very small amount, approved the agreement.

We say that the clause in the Act is satisfied by the sanction of three-fourths in value of the persons present at the meeting, and this was decided by your Lordship in *In re Tunis Railway Com-*

pany (May 22, 1874), affirmed on appeal (before the Lords Justices, July 11, 1874).

Carson, for Dixon, said he was desirous that the arrangement should be carried into effect.

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MALINS, V.C. :—

I think the agreement should be carried into effect. All the creditors of the company received notice of this meeting, and it must be presumed that those who did not attend left it to those who did to decide whether the agreement was advantageous or not, or they took so little interest in the matter that they did not think it worth their while to attend. At all events, I think that under the Act of Parliament only those creditors who were present at the meeting are to be attended to, and that three-fourths in value of those present are sufficient to sanction the contract.

Solicitors for Company : *Newman, Stretton, & Hilliard.*

Solicitors for Dixon : *Cobbold & Woolley.*

### NEEDHAM v. RIVERS PROTECTION AND MANURE COMPANY.

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*Judicature Act, 1873, s. 24, sub-s. 5—Stay of Proceedings in a different Division  
—Voluntary Winding-up.*

*16 B.P. 1271*

The jurisdiction of the Court of Chancery in winding-up matters not being taken away by the Judicature Acts, the Chancery Division of the High Court of Justice is the proper Division in which all matters relating to winding-up business should be brought; and this applies to the stay of actions in any other Division of the Court.

The same principle applies where a company is being wound up voluntarily.

A VOLUNTARY winding-up had been resolved upon by the *Rivers Protection and Manure Company*, and an action had been brought against the company by a creditor in the Common Pleas Division of the High Court of Justice.



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*Glasse*, Q.C., and *Burrell*, now moved that the action in the Common Pleas Division might be restrained.

This would have been the ordinary practice before the 1st of November, but the new *Judicature Act* of 1873, by the 24th section, sub-section 5, has provided that no injunction shall be granted in future by one Court to restrain proceedings in another branch of the Court; and in *Kingchurch v. People's Garden Company* the Common Pleas Division of the Court refused to stay an action in a winding-up matter (1).

*Methold*, for the Plaintiff:—

The only Court which can restrain these proceedings is that Division of the Court in which the action is pending.

MALINS, V.C.:—

This point has been much discussed lately, and since the question was before me on a recent occasion I have well considered the Act of Parliament, and I still remain of opinion that there is nothing in the new Judicature Acts to interfere with that jurisdiction in winding-up matters which was by the Winding-up Acts vested in the Court of Chancery, and, consequently, that the Chancery Division of the High Court of Justice has now the same power in respect of winding-up business which it exercised previous to the 1st of November.

This is a case in which the company has been wound up voluntarily. That fact does not bring the company directly under the jurisdiction of the Court; but in case of any question arising in the winding-up, it will be the duty of the liquidator to bring the matter before this Division of the Court. It is provided by the Winding-up Acts that any application may be made during the progress of a voluntary winding-up, either by the liquidator or by any contributor of the company. It is true that the creditors of a company have no right to apply to the Court under a voluntary winding-up; but in case the creditors have any ground of complaint, they have the power of applying to the Court by petition to have the voluntary winding-up carried on under supervision.

(1) 1 C. P. D. 45.

It is quite clear that whatever application is made it must be made to the Chancery Division of the Court.

Before the 1st of November this application would have been a mere matter of course, for it is an essential provision in the Winding-up Acts, that after the commencement of winding-up proceedings no action should be allowed to proceed by any creditor against the company without leave of the Court, and for this very sufficient reason, that the object of a winding-up is to obtain an equal distribution of the assets of the company amongst all the persons entitled; instead of which, if one creditor brings an action on his separate account, he may obtain an unfair advantage over the other creditors. I can find nothing in the new Judicature Acts to take away the powers of the Chancery Division of the High Court of Justice which were previously exercised by the Court of Chancery in winding-up matters.

It is true that the *Judicature Act* provides that all actions must be stayed by the Court in which the action is pending; if this had been a winding-up under supervision, then the Chancery Division would have been the Court in which the action would have been pending; but in a sense it is nevertheless a matter pending in this Court, because every application made in the winding-up must be made in this Division of the Court only. It is obvious why this branch of business has been particularly reserved for the Chancery Division, because the machinery used here is specially applicable to such matters, and the Common Law Divisions of the Court have had no knowledge of such proceedings, and are not provided with the necessary machinery for taking the accounts and deciding between the different rights of creditors and contributories.

Upon these considerations, I am of opinion that this is the proper Division of the Court for such an application to be made, and I will therefore make the order asked.

It had better be understood, and so reported, in order that if I am wrong I may be set right on appeal, that in my opinion the Chancery Division is the right Court in which all applications should be made in winding-up matters.

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*Methold* referred to the case of *Walker v. Banagher Distillery*

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*Company*, lately heard in the Queen's Bench Division, in which the Court made an order to stay an action pending in that Division, on the ground that a voluntary winding-up of the company had been commenced.

The VICE-CHANCELLOR:—I think in that case the Queen's Bench Division were perfectly justified in making such an order; but at the same time I think this Court may exercise the same jurisdiction in winding-up matters, and I also consider that this is the most convenient Court in which such orders should be made.

Solicitor for Company : *J. A. Redhead.*

Solicitors for Plaintiff in the action : *Pyke, Irving, & Pyke.*

(1) *See 1875/211.*

HAMILTON *v.* DALLAS.

[1874 H. 118.]

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1875

July 22, 24;  
Nov. 9.

*Domicil—Peer of England—Code Napoléon, Art. 13—Intestacy—Distinction between Domicil de facto and legal Domicil in France.*

A peer of the British Parliament is not, by reason of his obligation to attend the House of Peers whenever his presence there is required, incapacitated from acquiring a domicil of choice in a foreign country.

A *de facto* domicil governing the succession to personal property of which he dies intestate may be acquired in *France* by a foreigner who has not obtained the Government authorization imposed by the *Code Napoléon*, Art. 13, as the condition for enjoyment by a foreigner resident in that country of full civil rights.

ADJOURNED SUMMONS raising the question of the domicil of the late Lord *Howden* at the time of his death in 1873.

Lord *Howden*, a deputy-lieutenant of the county of *York*, G.C.B., and lieutenant-general in the army, was born in *England*, and retained these titles until his death. In 1850 he went to *Madrid* as Her Majesty's envoy extraordinary to the Court of *Spain*.

In the same year he sold his house and property at *Grimston Park* in *Yorkshire*, and all his real estate in *England*. A portion of his fortune was invested in securities in *England*, and until the time of his death he kept a current account with a *London* banker.

In 1857, on his recall from *Madrid*, he took up his residence definitely in *France*, and bought an estate near *Bayonne*, where he built himself a house called the *Casa* or *Château Caradoc*, in which (except during the siege of *Paris*, when he was shut up in the city) he lived until his death in 1873.

During June and July, 1859, he was in *England* on a visit, on which occasion he attended for the last time in the House of Lords.

In October, 1861, he retired from the army by the sale of his commission, but, according to the War Office regulations, his name was retained in italics in the army list upon his notifying (which was done until his death) the fact of his being alive twice a year.

Early in 1863 he paid a short visit to an old friend, Mr. *G. R.*



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*Smith*, in *Scotland*, after which he was never again in *Great Britain*.

Upon this occasion his relative, Sir *Hamilton Dallas*, hearing of his being in *England*, wrote to invite him to come and stay with him. In answer to this invitation, which did not reach him until after he had left *England*, Lord *Howden* replied from *Paris*, in a letter dated the 12th of February, 1863, as follows:—

“I regret that circumstances prevent my accepting it (the invitation), not so much from its material convenience, which is very attractive, as from the opportunity it would have given me of seeing you and profiting by your neighbourhood. I have no intention whatever of going to *England*, and I do not see any probability of my ever crossing that riotous rivulet again. As you say, I am little interested in English politics, but I am still much less so in all things appertaining to what you call ‘court circles.’ I have been displaced from the first, and never had any real relationship with the second. We have both seen a great deal of warm suns in our life; perhaps your affection for the brilliant deity is not so great as mine. I confess that I seek him with unlimited devotion, and I am appalled by both the moral and physical gloom of *England*. I trust that your health keeps good. I see that you write from the country, and I therefore presume you like its exercise. I hope you will not completely adopt the English system, which has always appeared to me an oscillation between undue fatigue and undue tonic.”

In 1871 an action was commenced both at *Bayonne* and also in the Court of Queen’s Bench against Lord *Howden* by one *Albano*, an architect, who had been employed upon the building of the villa near *Bayonne*.

In April, 1872, Messrs. *Freshfields*, who acted as his Lordship’s solicitors in *England*, received from him the following letter:—

“*Château Caradoc, Bayonne, France.*

“2nd April, 1872.

“When, a short time ago, I transmitted to you the original writ for the tribunal of *Bayonne* served on me by Mr. *Benedict Albano*, I omitted to mention that I immediately accepted the jurisdiction of the French tribunal on account of my being *boni*

*fide* domiciled, and have been so for twenty years, in this country, ‘*sine animo revertendi* ;’ and that I have no domicile in *England* or any other country excepting the one from which I now write.”

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In an affidavit sworn by him in this action Lord *Howden* stated :—

“In or about the year 1850 I left *England*, and in or about 1857 I came to reside in *France*, where I have resided for the last fifteen years. I have no intention of returning to *England* for the purpose of permanently stopping there, nor have I any dwelling-house, estate, or other real property in any country save and except in *France*.”

Lord *Howden* never acquired the authorization of the French Government for the establishment of his domicile in *France*. He died at the *Château Caradoc* on the 9th of October, 1873, having on the 8th of June, 1860, made a will, written in his own hand in English, thereby confirming in all its contents his will made at *Paris* on the 17th of November, 1858 (relating to his property in *France* only).

By the will of June, 1860, which related to property in *England* only, Lord *Howden* directed the residue of his property remaining in *England* after payment of debts and legacies, &c., to be divided into four portions, one of which was given to *Charles Cradock*, since deceased.

The share of *Charles Cradock* having lapsed by his death in Lord *Howden*’s lifetime, there was an intestacy as to this one-fourth of the residue; and a suit having been instituted for the administration of Lord *Howden*’s estate, it became necessary, for the purpose of determining the succession of this one-fourth of the residue of which there had been an intestacy, to settle whether Lord *Howden*’s domicile was at the time of his death French (in which case the personalty would be divisible into two portions, one going to the next of kin on the paternal, the other to the next of kin on the maternal side), or English (in which case Lady *Rose Meade*, as his sole next of kin according to the *Statute of Distributions*, would be alone entitled).

This question having been raised by adjourned summons was now adjourned into Court.

V.-C. B.      *Kay*, Q.C., and *Yate Lee*, for Sir *R. Hamilton*, in support of a French domicil:—

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It is established by the evidence that Lord *Howden* deliberately took up his residence in *France* in 1857 *sine animo revertendi*, and made it his permanent home, and remained there until his death, so as *animo et facto* to effect a change of domicil and to acquire a French domicil of choice: *Udny v. Udny* (1); *Forbes v. Forbes* (2); and accordingly the right of succession to the personal property in respect of which he died intestate must be governed by the law of the country in which he was domiciled at his death.

It will be contended that, having regard to the *Code Napoléon*, Art. 13 (3), a foreigner cannot become domiciled in *France*, even for the purposes of succession to his personal property, without authorization by the government.

But that article is dealing with municipal (*droits civils*) as distinguished from international rights. It does not regulate, and has nothing to do with, the succession to an intestate's personal estate, and, indeed, it could not affect the paramount rule *mobilia sequuntur personam*, derived from the *jus gentium*, by which questions of domicil are regulated. Moreover, Art. 13 is an enabling statute, conferring important privileges on those who take advantage of it, and cannot by any legitimate principles of interpretation be considered as imposing by implication a restriction on foreigners to which they were not subject before the promulgation of the Code: *Cole on Domicil of Englishmen in France* (4). For the enjoyment by a stranger of full civil rights, while he continues to reside in *France*, certain formalities have to be gone through, and he must obtain the authorization of the government admitting him to establish his domicil there. But for the purpose of determining questions of testacy or intestacy, and the right of succession to his moveable property, it is sufficient, without the authorization of the French Government, that the stranger by the effect of a fixed residence, combined with the intention of residing, shall

(1) Law Rep. 1 H. L. Sc. 441.

(2) *Kay*, 341. 1875 648

(3) *Code Napoléon*, Article 13:  
"L'étranger qui aura été admis par  
l'autorisation de l'Empereur à établir

son domicile en France y jouira de  
tous les droits civils, tant qu'il con-  
tinuera d'y résider."

(4) Pages 22, 30, 75.

have become *de facto* domiciled in *France*: *Bremer v. Freeman* (1). The *droit civil* has nothing to do with the case. Lord *Howden* did not want any civil rights, and did not ask for any. We shall be told that according to recent decisions of the French Courts a domicile *de facto* acquired in *France sine animo revertendi*, cannot supply the authorization required by Art. 13: see *Sussmann's Case* (2); *Olivarez' Case* (3). But these decisions in the Court of Cassation amount at the highest to the construction placed by the French Courts upon the French Code and the Law of the 14th of July, 1819, which, repealing Arts. 726 and 912 of the Code as to the disqualification of foreigners to succession, declares that foreigners shall be entitled to succeed and to dispose and to receive in the same way as French subjects throughout the realm: *Lois Usuelles (Roger et Sorel) V° Aubaine*.

Even if it were necessary to resort to the construction put by the French Courts upon Art. 13 of the Code, it is established by recent decisions in the *Cour de Cassation*: *Lethbridge's Case* (4); *Speech's Case* (5), that the authorization of the government is not a condition precedent to establishing a domicile in *France*, but ensures to a foreigner the consequences of such establishment, so far as regards the exercise of all civil rights; and, further, that a foreigner who resides habitually in *France* without having obtained the previous authorization of the government can have a *de facto* domicile in that country involving consequences which are certain (*e.g.*, the regulation of his succession) though less extensive than those which are conferred by Art. 13. This view, which is that ultimately adopted by *Merlin*, *Répertoire de Jurisprudence*, 5<sup>me</sup> Ed. (1827), tome 5<sup>me</sup> *Domicile*, in correction of the opinion expressed in his earlier editions (see *Cole*, *Domicil*, 26), is strengthened by the Law 23-25, April, 1871. "4. *Sont assujettis aux droits de mutation par décès les fonds publics, actions, obligations, parts d'intérêts, créances et généralement toutes les valeurs mobilières étrangères, de quelque nature qu'elles soient, dépendant*

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(1) 10 Moo. P. C. 306.

(2) Dalloz, Rec. Pér. 1872, Part ii. p. 465.

(3) Phillim. Inter. Law, vol. iv. p. 231.

(4) Dalloz, Rec. Pér. 1874, Part i.

(5) Dalloz, Rec. Pér. 1872, Part ii.



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*de la succession d'un étranger domicilié en France avec ou sans autorisation.*" Dalloz, *Recueil Périodique*, 1871 (1), and as stated in the opinions of MM. Betolaud, de Coussergues, Senard, and Desmarets, the advocates to whom the question has been submitted, it seems no longer possible in the presence of such a formal legislative text, to contend that a foreigner cannot be domiciled in *France* without authority from the government.

*Jackson*, Q.C., and *Onslow*, for the Plaintiff, also supported the above contention, and referred to *Thomson v. Advocate-General* (2) as shewing that no legacy duty would be payable upon Lord *Howden's* personal property in the event of his domicile at the time of his death being declared to have been French. They also cited *Douglas v. Webster* (3); *Onslow's Case* (4); *Bremer v. Freeman* (5).

*Hinde Palmer*, Q.C., and *Nalder*, for Lady *Rose Meade*, Lord *Howden's* sole next of kin according to the English mode of distribution, and

*W. W. Karlake*, for the Commissioners of Inland Revenue:—

Lord *Howden's* domicile at the time of his death remained English, and the succession to the property of which he died intestate must consequently be regulated by English law.

1. His domicile of origin being English, Lord *Howden* had no power as a peer of Parliament to divest himself of his English and acquire a foreign domicile, and thus get rid of the duties imposed by his position. Peers are created for two reasons:—1. *ad consulendum*; 2. *ad defendendum regem*; "on which account the law gives them certain great and high privileges, such as freedom from arrest, even when no Parliament is sitting; because it intends that they are always assisting the sovereign with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour": *Stephen's Commentaries* (6); *Bracton* (7).

(1) Part iv. p. 62.

(4) Phillim. Inter. Law, vol. iv. p. 227.

(2) 12 Cl. & F. 1.

(5) 10 Moo. P. C. 306.

(3) Law Rep. 12 Eq. 617.

(6) Vol. ii. book iv. ch. 5.

(7) Lib. i. c. 8, p. 82; Co. Litt. 110.

These high privileges and position are not personal, but held upon the condition of discharging the functions appertaining to their office. Of these the principal one is attendance in Parliament, from which they may not absent themselves without special dispensation (which dispensation is contrary to law: *Coke*, 4th Inst. (1); *Cruise's Dignities* (2)), on pain of being amerced or otherwise punished: 5 Ric. 2, c. 4; 6 Hen. 8, c. 16; it being a high offence for any subject to deny the king that assistance for the good of the public, either in his councils or wars, which by law he is bound to give him; as for a peer not to come to the Parliament at the day of summons, or to depart from thence without the king's license: *Hawkins' Pleas of the Crown* (3).

Accordingly, in the time of the Powder Plot, Lords *Mordaunt* and *Stourton* were fined in the Star Chamber 10,000 marks and 6000 marks for not attending the first day of Parliament, and remanded to the Tower during the will of the king: *Viner's Abridgment*, 'Peer' (B); *Coke*, 4th Inst. (4). These doctrines, though they smack of antiquity, have not fallen into desuetude, for it is still usual on occasions of urgent business to order the House of Lords to be called over, and to enforce the order upon absent lords by fine and imprisonment, two modern instances being the illness of King *George III.*, the 1st of November, 1810, and the bill for degradation of Queen *Caroline*, 1820: *May's Parliamentary Practice* (5). Being under this positive obligation to attend in their place in Parliament to advise their sovereign on all occasions when required, their position is like that of an officer in the army, to whom, from his obligation to return to active service if ordered, it is not competent to acquire a domicile in a foreign country: *Hodgson v. De Beauchesne* (6). Not being in a position to abandon his English domicile of origin, the intention, even if to a certain extent complete by the fact of his having gone to *France animo manendi*, would not be sufficient to change the domicile: *Craigie v. Lewin* (7). Residence and domicile are two perfectly distinct things; and if there was, as in this case, any

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(1) Page 49.

(2) Page 80.

(3) Vol. i. p. 65.

(4) Page 44.

(5) Page 212.

(6) 12 Moo. P. C. 285, 316.

(7) 3 Curt. Eccl. 435, 445.

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obstacle to getting rid of the English and acquiring a foreign domicile, the domicile of origin will not be lost by the mere abandonment of an English residence: *Bell v. Kennedy* (1).

2. Even assuming that Lord *Howden* was not incapacitated by his peerage from acquiring a foreign domicile, the *animus* with which he took up his residence in *France*, though coupled with the *factum* of long-continued residence there, is not enough to make his domicile French, for the purposes of succession or testamentary disposition, *Collier v. Rivaz* (2), unless, as is provided by the Code, Art. 13, the authorization of the government has been obtained. *Bremer v. Freeman* (3) has been relied on in support of the contention that, although the authorization of the French Government under Art. 13 has not been obtained, a domicile regulating all questions of testacy and intestacy may be acquired in *France*. But this decision of the Privy Council was opposed to the decisive opinion given by ten advocates of the highest reputation in *France*, named by the President of the Civil Tribunal of the *Seine* (including MM. *Berryer*, *Dupin*, *Marie*, *O. Barrot*, *Chaix d'Est Ange*), that in that case the testatrix, not having obtained from the French Government the authorization to establish her domicile in *France* in the terms of Art. 13, had never acquired in *France* a domicile capable of regulating her will or the form of her will by the law of that country: see *Phillimore's International Law* (4). Moreover, it was received with such alarm that it gave rise to the Act 24 & 25 Vict. c. 114, which enacts that without regard to domicile every will made by a British subject shall, as regards personal estate, be valid if made according to the forms required by the law of the place where it was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. As was observed by Lord *Lyndhurst* in the debate on that bill (*Hansard's Parliamentary Debates* (5)), that decision "had tended very considerably—at least so far as residents in *France* were concerned—to increase the doubt and diffi-

(1) Law Rep. 1 H. L., Sc. 307, 320.

(3) 10 Moo. P. C. 306.

(2) 2 Curt. Eccl. 855.

(4) Vol. iv. p. 235.

(5) Vol. clxii. p. 1638.

culty in which the subject was involved," and had not met with general approval: *Sugden's Real Property Stat.* (1). Mere domicile *de facto* in a foreign country is not sufficient to regulate the right of succession, even by the law of nations (*Merlin, Rép. de Jurisp. V<sup>o</sup> Domicile*, § 13), and certainly is not sufficient by the municipal law of *France*. The most recent decision in the Civil Chamber of the *Cour de Cassation*, *Forgo's Case* (May 4, 1875), decides that domicile *de facto* without authorization from Government is not sufficient to confer a legal domicile with the judicial effects therewith connected. *Melizet's Case* (Jan. 12, 1869) (2), *Sussman's Case* (3), *Spech's Case* (4), are also distinct authorities that without the prescribed authorization a stranger, though he may have fixed his residence in *France* and dwelt there *sine animo reverendi*, cannot acquire either the enjoyments of civil rights or a domicile in *France*. To the same effect is *Lynch's Case* (March 13, 1850) (5), where the French Court refused to entertain the settlement of the succession of the deceased on the ground that, not having been naturalised a Frenchman, and not having even obtained authorization to establish his domicile in *France*, he died an Englishman, and his fortune, being wholly personalty, must be governed by the law of *England*. *Thornton v. Curling* (*Cour de Cassation*, 1826) decides conversely, that as *Thornton*, an Englishman, had obtained the authorization of Government to establish his domicile in *France*, his succession and the validity of his will were subject to the law of *France*: *Phillimore's International Law* (6). The advocates who have been consulted on our behalf—MM. *Carel*, *Demolombe*, *Moreau*—concur in holding that Lord *Howden* could not acquire in *France* a legal domicile capable of affecting the transmission by way of succession of his moveable property without the authorization of the government, and that as he retained his English nativity, his political prerogatives and titles, his personal *status* remained English, and his moveable property on his death became transmissible to his English next of kin according to the rules of the law of *England*.

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(1) Page 403.

(2) Dalloz, Rec. Pér. 1869, Part i. 294.

(3) Dalloz, Rec. Pér. 1872, Part ii. 65.

(4) Dalloz, Rec. Pér. 1872, Part ii. 235.

(5) Sirey's Rep. (1851).

(6) Vol. iv. p. 223, *et seq.*



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 1875 *Expliqué* (2); *Pardessus, Cours de Droit Comm.* (3); *Duranton, Cours*  
 HAMILTON *de Droit Français* (4); *Pothier* (5); *Pigeau, La Procédure Civile* (6).]

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*Eddis*, Q.C., and *Kekewich*, for the executors of the English will.

*Kay*, in reply:—

Upon the first point, there is no analogy between the case of an officer in Her Majesty's army, who is bound, on pain of losing his commission, to return to active service when called upon, and that of a peer who might render himself liable to a pecuniary fine, but could by no possibility be deprived of his peerage or any of the privileges attaching to his rank for absence beyond the seas and non-attendance in Parliament. The cases of *Hodgson v. De Beauchesne* (7), and *Craigie v. Lewin* (8), have, therefore, no application. It may be that a peer cannot change his political status, or, putting off his allegiance, become a naturalised Frenchman. But the question of naturalisation and allegiance is perfectly distinct from that of domicile: *Udny v. Udny* (9), and there is no authority for holding that a peer cannot change his residence, and of his own choice acquire a domicile in a foreign country which will regulate the succession to his personal estate: *Bempde v. Johnstone* (10); *Somerville v. Somerville* (11); *Heath v. Samson* (12). Art. 13 of the Code refers entirely to the enjoyment of civil rights—those personal privileges given to a French citizen of which a foreigner settled in France may wish to avail himself. But the enjoyment of civil rights during life, a question of municipal law, has nothing whatever to do with the succession to a man's property after his death, which is regulated by his domicile, a branch of international law depending on rules common to the jurisprudence of all civilised nations, and, as we submit, unaffected by the decisions of the French Courts upon provisions

(1) Art. 102, 107, 110.

(2) Vol. xviii. p. 378.

(3) Page 773.

(4) Liv. i. tit. iii. 353.

(5) Vol. vi. p. 67, 68.

(6) Vol. i. p. 57.

(7) 12 Moo. P. C. 285.

(8) 3 Curt. Eccl. 435.

(9) Law Rep. 1 H. L., Sc. 441.

(10) 3 Ves. 198.

(11) 5 Ves. 750.

(12) 14 Beav. 441.

of their own municipal law. *Collier v. Rivaz* (1) has been distinctly overruled by *Bremer v. Freeman* (2); and it is now settled, in accordance with the law of nations, that domicil *de facto* in a foreign country is enough to attract the law of succession prevailing in the country of the *de facto* domicil; and, in conclusion, we say that Lord *Howden* was not incapacitated by his peerage from abandoning his English domicil of origin and acquiring a domicil in *France*; and that, having *de facto* acquired a domicil in *France*, the succession to the personal property of which he died intestate must be regulated by the law of that country, although he never obtained the authorization to establish his domicil in that country required for the enjoyment of full civil rights by the *Code Napoléon*, Art. 13.

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BACON, V.C. :—

The first question is as to Lord *Howden's* domicil. It is asserted, not only that he did not acquire, but that he was not competent to acquire, a domicil in *France*. For the purpose of establishing that proposition, his condition as a peer of Parliament is referred to, and the argument is strengthened by reference to cases in which military officers, it was said, were not capable of acquiring a domicil in a foreign country by reason of the obedience which they were bound to pay to the military regulations that existed in their own country. Upon the first point—that is, the incapacity of a peer to acquire a domicil, because of his duty to advise the Queen whenever she calls for his advice, or to attend the House of Peers whenever his attendance there is required—I should be very sorry, without some plain authority, at this time of day, for the first time to decide that any such law does now prevail, or that it ever did prevail. That a peer is under certain social municipal obligations, of course need not be said. If he neglects them, he may incur censure, perhaps punishment, but that is the extreme liability which he incurs. If he is liable to pay a fine, he must pay it; but how does that affect the question whether he can do that which every other man can do, namely, change the place of his residence, and fix for the whole of his

(1) 2 Curt. Eccl. 855.

(2) 10 Moo. P. C. 306.

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life his residence in another country? As to the authorities which have been referred to, in my opinion neither the Star Chamber, nor the old books referred to by *Blackstone*, nor any other authority that I have heard of, are sufficient to maintain a proposition which would be startling, if it were carried to its full extent, and prevent a peer from going, no matter for how short a residence, abroad, and taking up his residence at a bathing place, or anywhere else that he thought fit—that it would be positively against his duty is, I think, saying too much, and for the present it is enough to say that, in the absence of any kind of authority upon that subject, I decline to adopt what seems to me to be so imaginative a proposition. The case of the soldier is in itself entirely different. By the regulations of the military discipline in this country, of course a soldier is always bound to obey commands. A soldier in the service of the *East India Company* who, in the discharge of his military duties, finds it necessary to acquire a residence, gets by that fact, as the case referred to (*Hodgson v. De Beauchesne* (1)) recognises, what has been called an Anglo-Indian domicile, and the different decisions establish that he had there his domicile. Then he changes that. Under what circumstances? He gets permission, which is called a furlough, to come for a time and visit *Europe*. He does so; he lives at various places, but there is not the slightest indication of his intention either of giving up his military rank, or parting with any property that he had acquired in his place of domicile. Either in *France* or in *Scotland* he sojourns for as long a time as suited him, but upon no single occasion is it suggested that he ever expressed an intention of not returning to *India*. He was bound to do one of two things: either to return to *India* if he was called upon to do so, or to resign his commission. There is no evidence in either of the cases which have been referred to that any such intention existed. It is mere commonplace, and hardly necessary to repeat that upon a question of domicile the test must always be the *animus* and the *factum*. The intention with which a man changes his residence is easily ascertained. The circumstances under which he resides in a foreign country are easily ascertained as matters of fact; and the matters of fact, as far as

Lord *Howden* is concerned, are, in my opinion, most clear and conclusive. Possessed of large estates, as it seems, in *England*, he sold them all soon after or about the time that he went abroad in a diplomatic character. He retained none of his property in *England*, and it is not suggested that he ever had a residence of any sort, or any place that he could have inhabited in this country, belonging to him. He went first and performed his diplomatic services in *Spain*, and then settled himself in *France*, near *Bayonne*, where he built a house in which he established himself, and there and in *Paris* he passed the rest of his life, visiting *England* only upon one occasion, which has been mentioned, and which brought from him that letter which is referred to in Sir *Robert Hamilton's* affidavit. Nothing can be plainer than the expressions in that letter. If the *animus* is to be looked for, where can you find it better than in the expressions in the letter which has been referred to, and in the man's own conduct. He states in the plainest terms possible, and even gives his reason for the determination he has come to, that he never means to visit *England* again; that he is dissatisfied with *England*, and not pleased with the prospect of crossing the "riotous rivulet" again. Could a jury, or any other tribunal to whom those facts were submitted, hesitate for a moment to say that Lord *Howden* had established himself in *France*, and that he had done so without the intention of ever returning to *England*? It does not rest upon that alone, because there is his affidavit, which had been made upon the occasion of the action brought against him by *Albano*, in which he explains his residence in *France*, and expresses his determination not to return to *England*. He expresses the same intention in the letter to Mr. *Freshfield*, which is mentioned in Mr. *Freshfield's* affidavit. So that, upon this collection of facts, there cannot be a particle of doubt that Lord *Howden*, as far as he was concerned, had positively and peremptorily made up his mind to renounce his residence in this country, and to take up his abode in *France*, and there to live. That determination seems to have undergone no change during all the days of his life. If, then, it was competent for him, as, in my opinion, it was abundantly competent for him, or any other free man, peer or peasant, to change his residence from the place of his origin, and to take up a domicile in a foreign

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country, Lord *Howden* had *de facto cum animo* done that beyond all possibility of doubt or question. That is the first point which has been elaborately, and very ably and satisfactorily, argued before me.

Then it was suggested that by the French law it was not competent for Lord *Howden* to acquire a domicile. The 13th section of the *Code Napoléon*, which has been referred to for that purpose, in my opinion, bears no such construction as is sought to be put upon it. It cannot be said that he could not acquire the right to reside in *France*.

His Lordship, after referring to Art. 13, proceeded:—In the first place, I ask myself—there being no questions of testacy as in *Bremer v. Freeman* (1)—has he asserted any right? He has asserted no right that I know of, except the right of residing, and that he has a right to reside by the law of nations, by the law of *France*, and by every law of reason and good sense, is not to be disputed; but a right to succeed to the property of which he has died intestate is not comprehended in or covered by the 13th Article. On the contrary, turning to that chapter of the Code which treats of the domicile, Art. 102 provides that the domicile of every Frenchman as to the exercise of his civil rights is in the place in which he has his principal establishment. Then it speaks of the change of domicile, and so on, and it speaks of other persons than Frenchmen, saying that a married woman has no other domicile than that of her husband, a minor not emancipated shall live with his father or mother, or his tutor, who may be a foreigner—the minor may be a foreigner—and minors who serve or travel habitually with another person shall have the same domicile as the person they serve, with whom they work, and as long as they remain in the same house, so that the fact that a foreigner can acquire a domicile *de facto* in *France* is not for a moment to be called in question. It requires no provision in the Code for that; it is a law paramount to the law of the Code, not provided against nor provided for in the Code, but a natural and national right against which there is no interdiction or prohibition. Now that this must be the law will be found on referring to *Cole* on Domicil (2), in which the matter is treated, and by the authori-

(1) 10 Moo. P. C. 306.

(2) Page 24, *et seq.*

ties to which he refers there; and without adopting Mr. Cole's conclusion, which I have no right to do—that is, to treat it as an authority, whatever respect I may feel for it—the passage in *Merlin* upon this subject of domicile, is, in my opinion, quite conclusive upon the question now before me. He says:—

“*Disons donc que l'étranger qui, sans la permission du Gouvernement, établit son domicile en France, se soumet par cela seul à la juridiction des Tribunaux Français, comme il acquiert par cela le droit de se marier, dans le lieu qu'il choisit pour sa résidence habituelle; comme il détermine par cela seul la compétence du juge qui, après son décès, devra connaître de la succession qu'il laissera en France.*”

So that if I am to take that as an exposition of the law, without referring to particular cases, it is plainly announced as being the law that a foreigner who, without any authority of the Government, shall establish his domicile, becomes entitled to enjoy certain civil rights; and, more than that, he submits to the authority of the Judge of the place which he shall inhabit, and that Judge shall have jurisdiction over the question of the succession to his property. That this is plainly the law is not disputed in any of the cases that have been referred to. It may be observed that it is not entirely lost sight of in *Udny v. Udny* (1), that very valuable case which has been so often referred to, where Lord *Westbury* expresses himself, after distinguishing between the political and the civil *status*, which has been gone into at length, and I need not therefore refer to it further than to quote this passage: “The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend.” The cases which have been referred to are not, any one of them, in the slightest degree at variance with that. *Forgo's Case* must be considered to be at present not in the shape of a binding authority as it is still subject to appeal. That *Forgo* was a resident in *France* is beyond all doubt, and that *Forgo* died intestate is

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(1) Law Rep. 1 H. L., Sc. 441, 457.

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likewise clear. The question was who was to succeed to his property? The Government said we succeed, because he had not the authority of the Government to live in *France*; it must have gone as far as that. That is, however, discountenanced by the Court of Cassation, and it is discountenanced by and inconsistent with every other authority that has been referred to. *Speck's Case* (1) is a direct authority against it. In *Speck's Case*, if the want of authorization by the government to a man's residence in *France*, and to making his holograph will in *France*, would have been enough, the Spanish consul was right in insisting upon the administration of his goods. It was plain, from the decision of the Court of Cassation, that the Spanish consul was not right—that he had no right whatever to interfere in the administration of his goods, although the testator in that case (the will not being in question as far as the case goes that I know of) not having any authority from the French Government, yet enjoyed civil rights to the day of his death, and the persons who claimed the succession were not impeded in the slightest degree by the restrictions of the 13th Article. Another clause referred to was Art. 110, which provides that the place where the succession shall open shall be determined by the domicile. *Speck's Case* and *Sussman's Case* (2) established, as I take it, clearly this, that upon the intestacy of a foreigner, who has not obtained the authority of the government, the succession shall open in the place where he had established his domicile, and shall be determined by the local Judge in the first instance, and (subject, of course, to any appeal that might be brought before a higher authority) that where the succession opens there it shall be determined, and there the persons who, according to French law, are entitled to claim his property, may come and have their rights determined. As far as *Forgo's Case* goes, the notion that the government can lay hands upon all the property and consider it theirs, for want of the formalities of the 13th clause being complied with, is wholly discountenanced. Under these circumstances, I entertain no doubt whatever upon the question which has been argued. I have no doubt of Lord *Howden's* competency to acquire a French domicile. I have no doubt of the fact that he did acquire that domicile beyond all

(1) Dalloz, Rec. Pér. 1872, Part ii.  
 235.

(2) Dalloz, Rec. Pér. 1872, Part ii.  
 65.

possibility of question. I have no doubt that the 13th Article, which speaks of the enjoyment by him or any other foreigner of *droits civils*, neither in its terms nor in its sense and spirit, has anything to do with the rights of the person who comes to claim his property at a time when he and all *droits civils* to be exercised by him are extinguished and gone. That disposes also of the Attorney-General's objection. I am not sorry to have had an opportunity of hearing Mr. *Karslake's* argument upon the subject, but I have not the slightest doubt of the well-settled law, that no legacy duty whatever is payable in respect of this intestacy, because of what I have said before as to the domicile.

Solicitors: *Bell, Stewards, & Co.*; *Bevan & Daniell*; *Freshfields & Williams*; Solicitor for Commissioners of Inland Revenue.

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## PEASE v. FLETCHER.

[1875 P. 21a.]

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Dec. 9.

*Practice*—Appointment of Receiver—Legal and equitable Mortgage of same  
*Property*—Judicature Act, 1873, s. 25 (8).

Under the power given by the *Judicature Act*, 1873, s. 25 (8), to appoint a receiver in all cases in which it shall appear just and convenient, the order made on interlocutory application for the appointment of a receiver was extended to the whole property comprised in the Plaintiff's security, as to part of which he was legal and as to part equitable mortgagee.

THIS was a motion for the appointment of a receiver over property in the *North Riding of the County of York*, of which the Plaintiffs, by an indenture of the 6th of December, 1873, were mortgagees from *Thomas Richardson*, subject as to part of the property comprised in their security to a prior mortgage bearing date the 31st of October, 1873.

By a memorandum of security dated the 18th of March, 1875, *Richardson* charged the property mortgaged to the Plaintiffs with payment to Messrs. *Fothergill & Hankey* (trading under the firm of the *Aberdare Iron Company*) of £15,000 and interest. Of this charge the Plaintiffs received notice.

On the 30th of April, 1875, *Richardson* filed a petition for



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liquidation by arrangement, and the Defendant *Fletcher* had since been appointed trustee under the liquidation.

In June, 1875, Messrs. *Fothergill & Hankey* filed a petition for liquidation, and the Defendant *Turquand* was appointed trustee under the liquidation.

The mortgagees under the deed of October, 1873, had never been in possession of the hereditaments comprised in their mortgage, or in receipt of the rents and profits.

Since his appointment as liquidation trustee of *Richardson*, the mortgagor, the Defendant *Fletcher* had entered into possession of the greater part of the mortgaged property, and been in receipt of the rents and profits.

No interest having been paid to the Plaintiffs for a year, they commenced an action in November, 1875, claiming an account of what was due to them on their mortgage, foreclosure on non-payment, and the appointment of a receiver. They now applied by interlocutory motion for such appointment.

*Kay*, Q.C., and *Caldecott*, in support of the motion :—

The only question is whether the receiver should be extended to that part of the property of which the Plaintiff is legal mortgagee. Although under the old practice the Court would not appoint a receiver on the application of a legal mortgagee, the power of the Court under the *Judicature Act*, 1873, s. 25 (8) is much enlarged, and a receiver may be appointed “in all cases in which it shall appear to the Court to be just and convenient that such order should be made,”—and this, coupled with the concluding words of the sub-section, “whether the estates claimed by both or either of the parties are legal or equitable,” seems to shew that a legal mortgagee may obtain the appointment of a receiver instead of taking the risk of entering on the property: *Wilson's Acts* (1). In this case it is clearly “just and convenient” that a receiver should be appointed, as the estates of which the Plaintiffs are legal and equitable mortgagees are intermixed; and, moreover, it is provided, *Judicature Act*, 1873, s. 25 (11), that in all cases of conflict or variance, not before enumerated, between the rules of equity and common law, the rules of equity shall prevail.

(1) Pages 64, 66.

[They also referred to Rules of Court, 1875, Order LII., rule 4, regulating applications under sect. 25 (8).]

*Herbert Lake*, for *Fletcher*, the mortgagor's trustee in liquidation, referred to *Habershon v. Gill* (Nov. 27, 1875) where *Quain, J.*, in Chambers, after stating the old practice of the Court of Chancery never to interfere with the legal estate upon the application of the party who had the legal estate, expressed an opinion that the latter part of sub-sect. 8 applied only to injunctions, and not to the appointment of a receiver.

*Kay*:—*Habershon v. Gill* was a case of ejectment, and has, therefore, no application.

BACON, V.C., said that, as he understood *Habershon v. Gill*, it was not a case in which, under either the old or the new practice, a receiver would be appointed on the application of the Plaintiff who was claiming under his legal title in an action of ejectment. In the present case the estates of which the Plaintiffs were legal and equitable mortgagees were mixed up together, and as there was no adverse possession, it was clearly a case in which, under the words of sect. 25 (8), it was just and convenient that a receiver should be appointed. The application would accordingly be granted, and the order would be extended to the legal as well as to the equitable estates, without prejudice to the right of the prior incumbrancers to take possession under their security.

Solicitors: *R. T. Jarvis ; Lewis, Munns, & Longden ; Travers Smith & Co.*

(1) *See MA (1875) 221*

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Dec. 3.

*In re H.'s ESTATE.*

H. v. H.

[1875 H. 56a.]

*Par 690**Practice—Trust Estate—Expectation of Bankruptcy—Appointment of Receiver before Service of Writ—Form of Order.*

Where bankruptcy and consequent loss to a trust estate is expected, a receiver may be appointed before the service of the writ in an action.  
Form of order.

THE Plaintiffs (children of a tenant for life) were interested in reversion in a legacy of £15,000 bequeathed by their grandfather to trustees for the benefit of his daughter and her children. The testator by his will authorized his trustees and executors to carry on his manufacturing business, and to employ his estate for that purpose; and they had carried it on, but, as alleged, unsuccessfully; and it was also alleged that the Defendants were on the eve of bankruptcy. It being important to secure the assets of the testator, as distinguished from the assets of the Defendants, this action was commenced. It was stated that two persons were now carrying on the business, one apparently in his own right, and the other in the character of executor of the testator.

This was an *ex parte* application for the appointment of a receiver (named in Court) before service of the writ in the action.

*Dickinson*, Q.C., and *Bryce*, for the Plaintiffs.

HALL, V.C., granted the application, the Plaintiffs undertaking that the receiver now appointed should give the ordinary security within ten days, and that they would accept any notice of an application to discharge the order; and also to inform the Defendants of the latter undertaking.

Solicitors: *Phelps & Sidgwick*, agents for *Sale, Seddon, & Co.*, Manchester.

YOUNG *v.* BRASSEY.

[1875 Y. 6a.]

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1875

Dec. 3, 6.

*Practice—Service of Writ—Motion for Injunction—Interrogatories out of the Jurisdiction—Judicature Acts—Rules of Court, 1875, Order II., r. 4—Title of Affidavit.*

When it is necessary to serve a writ in an action on a Defendant out of the jurisdiction there must be an affidavit in support of the application, and the order made under Rules of Court, 1875, Order II., rule 4, will provide, if necessary, for service of interrogatories, and also for the issuing of an injunction, if it should be applied for *ex parte*.

The affidavit should be intituled in the contemplated action, and also in the Judicature Acts.

12CLD 63  
14CLD 358  
19CLD 466

THIS was an application for leave, under Rules of Court, 1875, Order II., rule 4, to issue the writ in an intended action for service out of the jurisdiction. The affidavit in support of the application was intituled in the action.

*Samuel Dickinson*, for the Plaintiff.

HALL, V.C.:—

I have had occasion to consider what course ought to be adopted in cases in which a Defendant is out of the jurisdiction, and I have come to the conclusion that there must be an affidavit in support of an application to serve the Defendant out of the jurisdiction, and that the order giving leave to serve out of the jurisdiction should also provide for service of the interrogatories, if interrogatories shall be filed, and also for the issuing of an injunction when an injunction is asked for and applied for *ex parte*; the order as regards the interrogatories being expressed to come into operation from and after the issuing of the writ, and as regards the injunction, directing that the injunction do issue from and after the issuing of the writ. By the adoption of this course, the expense of several applications will be avoided; and where an injunction is required without delay, the delay consequent upon deferring the application for the injunction until the writ has been actually issued pursuant to leave given, will be avoided. In the case of

*Best see under <sup>U 2</sup> Steward v S <sup>1</sup> 14CLD 466*



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such injunctions the affidavit must of course go to the merits sufficiently to entitle the Plaintiff to the injunction. As to the affidavit being intituled in a non-existing action, it must have been intended that the Court should act upon such an affidavit, I have high authority for saying that a deponent could be indicted for perjury upon such an affidavit, but I think it is desirable that the affidavit should be intituled in the matter of the Judicature Acts as well as in the action about to be commenced.

Dec. 6. Leave was this day obtained in the same action to serve notice of motion for an injunction, and to serve interrogatories out of the jurisdiction.

Solicitors: *Janson, Cobb, & Pearson.*

V.-C. H.  
 1875  
 Dec. 9.

NEW WESTMINSTER BREWERY COMPANY ,  
 v. HANNAH.

[1875 N. 27.]

*42 ff Cas 159*

*Practice—Judicature Act—Rules of Court, 1875, Order XXXVIII., r. 1—  
 Evidence by Affidavit—Consent.*

The “consent for taking evidence by affidavit” under the Rules of Court, 1875, Order XXXVIII., rule 1, must be a formal consent in writing.

THIS was a motion on behalf of a Defendant in a suit pending on the 1st of November, 1875, which had not then proceeded as far as replication or notice of motion for decree, that a notice of trial under the new practice given by the Plaintiffs to her might be set aside, and that the Plaintiffs might be ordered to bring the cause to a hearing on evidence to be taken by affidavit.

The ground of the application was an alleged agreement between the parties that the evidence should be taken at the trial by affidavit, as under the old practice.

*Horton Smith*, for the Defendant, in support of the motion.

*Cookson*, Q.C., and *Whitehorne*, for the Plaintiffs, denied the existence in fact of the agreement alleged as the foundation for the motion: contending that a consent for taking evidence by affidavit, to be within the Rules of Court, Order xxxviii., rule 1, must be a formal consent, and not one to be extracted as the result of a correspondence in the manner attempted by the Defendant in this case.

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HALL, V.C.:—

As there appears to have been a misunderstanding between the parties, I shall make no order upon the motion; but I think that the consent to take evidence by affidavit, referred to in the Rules of Court, 1875, Order xxxviii., rule 1, must be a formal written consent, and not one to be gathered from correspondence between the parties.

Solicitors: *Withall & Compton*; *Wilkins & Blyth*.

### CHRISTIE v. OVINGTON.

[1873 C. 25.]

V.-C. H.

1875  
Dec. 20.

*Conveyance—Bare Trustee—Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), s. 5—*Land Transfer Act*, 1875 (38 & 39 Vict. c. 87), s. 48.

Where a surviving trustee of real estate had died intestate after the passing of the *Vendor and Purchaser Act*, 1874, and prior to the commencement of the *Land Transfer Act*, 1875, the legal estate vested in his heir-at-law notwithstanding the provision of the 5th section of the *Vendor and Purchaser Act*, 1874.

*Semble*, a person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, is a bare trustee within the meaning of the 48th section of the *Land Transfer Act*, 1875.

THIS suit was one for a declaration of the rights of persons interested in the fee simple of real estate, and for partition or a sale.

The Plaintiff, who was the owner of one moiety of the estate,

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had become the purchaser of the other. The purchase-money had been paid into Court. Between the date at which the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), came into operation (the 7th of August, 1874)—by sect. 5 of which it was enacted that “Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple such hereditament shall vest, like a chattel real, in the legal personal representative from time to time of such trustee”—and the date of the hearing on further consideration, the surviving trustee of the moiety which the Plaintiff had purchased died intestate, and as no person would take a grant of letters of administration, a question arose in reference to the manner in which the minutes should be drawn up so as to vest in the purchaser that moiety of the estate which was vested in the surviving trustee at the time of his death, having regard to the said 5th section, and to the 48th section of the *Land Transfer Act*, 1875 (38 & 39 Vict. c. 87), by which it was enacted that “section 5 of the *Vendor and Purchaser Act*, 1874, shall be repealed on and after the commencement of this Act (1st January, 1876), except as to anything duly done thereunder before the commencement of this Act; and instead thereof be it enacted that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of the *Vendor and Purchaser Act*, 1874, shall not apply to lands registered under this Act.” The surviving trustee of the moiety which the Plaintiff had purchased died intestate.

*A. Thomson*, for the Plaintiff, asked for the direction of the Court, whether the legal estate of the surviving trustee would vest in his heir-at-law or in his legal personal representative.

HALL, V.C.:—

The legal estate in this case must be got in irrespective of the 5th section of the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), and the 48th section of the *Land Transfer Act*, 1875 (38 & 39 Vict. c. 87). I am of opinion that the legal estate will, after

the 1st of January, 1876, be vested in the heir-at-law of the surviving trustee. The 5th section of the *Vendor and Purchaser Act*, 1874, will be repealed on and after the 1st of January, 1876, except as to anything duly done thereunder before that date; and assuming that nothing will have then been done under sect. 5, the legal estate will be in the heir-at-law. Therefore all that I can now do is to direct that all necessary parties do execute a proper conveyance. Who is a bare trustee is a question of general practical importance. Where there is a trustee whose trust is to convey, and the time has arrived for a conveyance by him, he is, I think, a bare trustee, whether considered in reference to the *Vendor and Purchaser Act*, 1874, s. 5, or in reference to the *Land Transfer Act*, 1875, s. 48. Mr. *Dart* and Mr. *Barber*, in the 5th edition of their *Treatise on the Law of and Practice relating to Vendors and Purchasers of Real Estate*, recently published (1), have expressed their view that "the Act does not define what is meant by a 'bare trustee' in this and the preceding section; and the term is generally considered to be ambiguous; but it will probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, and has been requested by them so to convey it." In my opinion the words "has been requested by them so to convey it" are not an important or a necessary ingredient to a person being a bare trustee, but leaving out these words, I approve of the statement which I have read from their valuable work.

Solicitors: *Ridsdale, Craddock, & Ridsdale*, agents for *W. Hartley, Settle, Yorkshire*.

(1) Page 517.

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—



V.-C. H.

*In re* AYLES' TRUSTS.

1875

Dec. 17.

*Part 648**Bequest by a Grandfather—Illegitimate Children—Daughter—Reputation.*

A testator, in 1839, gave property to trustees in trust to pay the income to his "daughter *A.*, the wife of *J. H.*," for life, and to divide the principal between all the children of his daughter *A.* when they should attain twenty-one in equal shares, and in case all the children of his daughter *A.* should die under twenty-one without issue there was a gift over in favour of a son. For some time prior to the date of the will and the death of the testator in 1840, *J. H.* and the daughter *A.* were living together as man and wife at *B.*, where the testator resided until within a few months of his death. They were married in 1845. Three children were born before the marriage—one before the testator's will and two after his death. One child was born after the marriage:—

*Held*, that the legitimate child only was entitled to the bequest.

*Occleston v. Fullalove* (1) and *Dorin v. Dorin* (2) discussed.

*JOHN AYLES*, of *Burley, Southampton*, by will, dated in March, 1839, gave to trustees the sum of £450 upon trust to invest, and to pay the income "to my daughter *Ann*, the wife of *James Hicks*, for her separate use for life," without power of anticipation, and to divide the principal between "all the children of my daughter *Ann* as and when they shall respectively attain the ages of twenty-one years in equal shares." There were clauses of survivorship and maintenance; and in case all the children of the testator's daughter *Ann* should die under the age of twenty-one without issue, there was a gift over in favour of his son *John*. The testator gave the rents and profits of some cottages and land to his daughter *Ann* for life, and directed that after her death the property should be sold, and the proceeds invested and be held by the trustees upon the same trusts as directed in reference to the sum of £450.

The testator died in 1840. For some time previously to his death, and at the dates of the will and his death, *James Hicks* and the daughter *Ann* were living together as man and wife at *Burley*, where the testator resided until within a few months of his death, but no ceremony of marriage had been or was gone through till

(1) Law Rep. 9 Ch. 147.

(2) Law Rep. 7 H. L. 568.

the 10th of October, 1845, when they were married. Three children were born before the marriage—one before the testator's will and two after his death, and one, the Petitioner, after the marriage. They were all baptised and described as the children of *James* and *Ann Hicks*. The daughter *Ann* died on the 2nd of October, 1871, having received the income, and the rents and profits during her life. The real estate had been sold. The money had been paid into Court. The Petitioner claimed to be entitled to the whole of the property.

*Dundas Gardiner*, for the Petitioner, after stating the facts, asked for a declaration that he was entitled to the whole of the property, submitting that there was clearly no intention to provide for illegitimate children.

*Mander*, for Respondents—illegitimate children of the daughter *Ann*—contended that, as the testator must have known all the facts and circumstances connected with his daughter and *James Hicks*, and their firstborn child, as they were all residing at *Burley*, where the testator had the opportunity of seeing them daily, they had acquired the reputation (or at any rate the one who was born before the testator's will and death had) of being the children of *James Hicks* and his daughter; and that upon the authority of the decisions in *Occleston v. Fullalove* (1), *In re Brown's Trusts* (2), and *In re Goodwin's Trusts* (3), they were entitled to share in the property.

*Badeock*, for the trustees, and *Speed*, for a Respondent interested in the gift over.

*Gardiner*, in reply, referred to the case of *Dorin v. Dorin* (4).

HALL, V.C. :—

I do not think that the case of *Occleston v. Fullalove*, and other cases of the same class, apply to a case like the present. That case was the case of a father or reputed father of children. The

V.-C. H.

1875

*In re*  
AYLES'  
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(1) Law Rep. 9 Ch. 147.

(2) Ibid. 16 Eq. 239.

(3) Law Rep. 17 Eq. 345.

(4) Ibid. 7 H. L. 568.

V.-C. H.

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*In re*  
AYLES'  
TRUSTS.

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case of *Dorin v. Dorin* (1) clearly shews that the word "children" must be taken to mean legitimate children, as much as if the word "legitimate" had been introduced before it, and that it cannot, in cases like the present, be construed to include illegitimate children. Therefore the Petitioner, the legitimate child, is entitled to the whole of the property after the payment of all the costs of the petition.

Solicitors: *Valpy & Chaplin*; *Dawson, Bryan, & Dawson*, agents for *W. Reade, Ringwood*; *C. P. Titt*; *Vizard, Crowder, & Co.*, agents for *Davy & Davy, Ringwood*.

(1) Law Rep. 7 H. L. 568.

*Ex parte* HALE. *In re* BINNS.

C. J. B.

*Bankruptcy—Landlord—Distress for Rent—Rent accrued due after Commencement of Liquidation—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 23, 31, 34.*

1875

Dec. 2.

22CLD418

When the trustee of a liquidating debtor continues in possession of premises of which the debtor was tenant, not having disclaimed the lease, the landlord has a right, as against the trustee, to distrain, without obtaining any leave from the Court, for rent accruing due after the commencement of the liquidation, even though it be rent which, under the terms of the lease, is payable in advance.

THIS was an appeal from a decision of the Judge of the *Huddersfield* County Court.

On the 24th of June, 1875, *Thomas Binns*, a woollen manufacturer at *Huddersfield*, filed a liquidation petition, under which *Thomas Westerby* was, on the 14th of July, appointed trustee.

On the 27th of May, 1875, an agreement in writing had been entered into between *Thomas Hale* and *Binns*, whereby *Hale* agreed to let and *Binns* agreed to take from the 15th of February, 1875, the top floor of a mill belonging to *Hale*, called *River Mill*, and *Hale* agreed to find and provide the main line shafting and steam power for working certain machinery which *Binns* intended to have and use on the premises. And it was agreed that *Binns* should pay on the 15th of February, 1875, £35 for one quarter's rent in advance, on the 15th of May £29 3s. 4d. for rent up to the 1st of August, 1875, and on the 1st of August, 1875, £55 for one quarter's rent in advance, and should make other subsequent payments.

At the commencement of the liquidation there were in the floor which *Binns* occupied certain machinery and goods belonging to him, of which the trustee took possession. The trustee did not disclaim the lease, nor did he expressly adopt it, but he continued in actual possession of the demised premises for the purpose, as he said, of winding up the estate. There was evidence on the part of *Hale* that since the liquidation commenced he had continued to supply steam power under the agreement just as before.

On the 12th of August, 1875, *Hale* levied a distress for the £55



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1875

*Ex parte*

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*In re*  
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—

rent which became due on the 1st of August, and under this distress some of the machinery and other goods were seized. No application had been made to the Court for leave to levy this distress. The Judge, on the application of the trustee, made an order restraining *Hale* from proceeding with his distress.

*Hale* appealed.

*Robson*, for the Appellant :—

There is nothing in the *Bankruptcy Act*, 1869, to take away the landlord's statutory right to distrain. Sect. 34 (1) does not apply to rent accrued due after the commencement of the liquidation. The trustee, not having disclaimed under the provisions of sect. 23, was occupying the premises under the terms of the agreement, and was subject to the ordinary liabilities of a tenant.

*Joseph Beaumont*, and *Priestly*, for the trustee :—

Under sect. 31 the landlord is enabled to prove for rent accruing due after the commencement of the bankruptcy. This he could not do under the former law. Moreover, sect. 34 differs from sect. 129 of the *Bankrupt Law Consolidation Act*, 1849, which dealt with the landlord's right to distrain for rent. Sect. 129 was a disabling clause, whereas sect. 34 is an enabling clause. The reasonable inference is that the right of distress for rent accruing after the commencement of a bankruptcy was not intended to remain. That right does not, as we contend, exist unless the trustee has expressly or impliedly adopted the lease. So long as the lease may or may not be adopted on behalf of the bankrupt's estate, the right of distress is limited by sect. 34, and the right of proof is regulated by sect. 31.

[They referred to *Ex parte Llynvi Coal and Iron Company* (2).]

(1) Section 34: "The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the com-

mencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available."

(2) Law Rep. 7 Ch. 28.

BACON, C.J. :—

If I were to accede to Mr. *Beaumont's* argument, the consequence would be that a trustee in bankruptcy might make use of a man's property without paying any rent for it, and might snap his fingers at him. The meaning of sect. 34 is that, if a landlord has been so weak as to allow his tenant to get into arrear with his rent for more than a year, he can, in the event of the tenant's bankruptcy, only prove as an ordinary creditor for the arrears beyond the year. It does not restrain his rights in any other way. There is no ground whatever for this injunction, and the order must be discharged.

Solicitors for Landlord: *Layton & Jaques*, agents for *Clough & Son, Huddersfield*.

Solicitors for Trustee: *Learoyd & Co.*, agents for *Learoyd, Learoyd, & Morrison, Huddersfield*.

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1875

*Ex parte*

HALE.

*In re*

BINNS.

*Ex parte* MONKHOUSE. *In re* DALE.

C. J. B.

1875

*Composition—Enforcing Provisions—Order on Trustee to sue Surety for unpaid Composition—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126.*

Dec. 3.

Under composition resolutions a trustee was appointed, and a surety for the debtor covenanted with the trustee to pay two of the instalments of the composition. These instalments were not paid when they became due:—

*Held*, that, upon the application of a creditor, the Court had jurisdiction under sect. 126 to order the trustee to sue the surety upon his covenant, but that the order should provide for the indemnity of the trustee against the costs of the action.

THIS was an appeal from a decision of the Judge of the *Newcastle-on-Tyne* County Court.

On the 1st of July, 1874, *G. D. Dale*, a shipbroker, filed a liquidation petition. The first meeting of the creditors was held on the 7th of August, 1874, when it was resolved to accept a composition of 6s. 8d. in the pound, payable in three instalments of 3s., 3s., and 8d., at one, three, and twelve months after the registration of the resolutions, the first two instalments to be secured in such manner as the committee of inspection should approve of.

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Ex parte  
MONKHOUSE.  
In re  
DALE.  
—

Four persons were appointed a committee of inspection, and *G. Monkhouse* was appointed trustee. The resolutions were confirmed on the 18th of August, and were registered on the 19th of August, 1874. On the 18th of September, 1874, a deed of covenant was executed between *Dale* of the first part, *J. W. Fenwick*, described as the surety, of the second part, the four members of the committee of inspection of the third part, and *Monkhouse* of the fourth part. This deed recited the proceedings under the petition, that the surety was willing to secure in manner thereafter expressed the first two instalments of the composition, and that the committee of inspection approved of the security; and the debtor and the surety thereby jointly and severally covenanted with *Monkhouse* that they, or one of them, would pay to him as trustee the first and second instalments of the composition at the times appointed for the payment thereof respectively, and the debtor alone covenanted to pay the third instalment. And it was declared that the trustee should stand possessed of the three instalments when received on trust to distribute them among the creditors. The first and second instalments were not paid when they became due. On the 11th of June, 1875, *G. Mirabita*, a creditor for £8000, applied to the County Court for an order to enforce the composition in his favour, and that *Dale*, and *Monkhouse* as trustee, might be ordered forthwith to pay to him the first and second instalments of the composition, and that *Fenwick* might be ordered forthwith to pay these instalments in default of payment by *Dale*. The Judge dismissed the application as against *Monkhouse* and *Fenwick*, and made an order on *Dale* for payment of the two instalments within fourteen days. On appeal to the Chief Judge this decision was affirmed (1). *Dale* did not obey the order, and on the 22nd of October, 1875, on the application of *Mirabita*, the Judge ordered that *Monkhouse*, as trustee, should forthwith take the necessary proceedings for obtaining payment to him as trustee from *Fenwick* of the first and second instalments of the composition, upon being indemnified to the satisfaction of the Registrar, the Registrar to refer thereon to the Judge if he should deem it necessary, and that *Monkhouse* should, out of the money so to be

(1) Law Rep. 20 Eq. 772.

recovered, pay the sum of £2400 to *Mirabita*. From this order *Monkhouse* appealed.

C. J. B.

1875

*Ex parte*  
MONKHOUSE.

*In re*  
DALE.

*Doria*, for the Appellant:—

I contend that the Court had no jurisdiction to make the order. Sect. 126 (1) only enables an order to be made to enforce the payment of the composition as against the debtor himself.

Moreover, the form of the order is wrong. The indemnity given to the trustee is not sufficient.

[He referred to *Edwards v. Coombe* (2); *In re Hatton* (3); *Ex parte Mirabita* (4).]

*De Gex*, Q.C., and *Finlay Knight*, for the Respondent, were not heard.

BACON, C.J.:—

In my opinion the order is perfectly right. There is no ground whatever for saying that the Court has exceeded its jurisdiction. By the resolutions of the creditors Mr. *Monkhouse* was appointed trustee. Those resolutions were registered and adopted by the Court. *Monkhouse* is responsible to the Court for the proper discharge of those duties which he took upon himself when he was appointed trustee. The instalments of the composition were not paid when they became due. With the sanction of the Court, as I must assume, the committee of inspection approved of the security which was to be given for their payment by Mr. *Fenwick* becoming surety. He executed a deed which contained a recital of all the proceedings and of the agreement that the payment of the composition should be secured by a covenant to be entered into by him with the trustee. Neither the debtor nor the surety having paid the instalment, one of the creditors comes to the Court and asks that the trustee may be ordered to perform his plain duty by suing the surety upon his covenant. This is what

(1) Sect. 126 provides: "The provisions of any composition made in pursuance of this section may be enforced by the Court on a motion made in a summary way by any person interested."

(2) Law Rep. 7 C. P. 519.

(3) Ibid. 7 Ch. 723.

(4) Law Rep. 20 Eq. 772.



C. J. B.

1875

*Ex parte*  
MONKHOUSE.*In re*  
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the County Court Judge has ordered him to do, and the order carefully protects the trustee against the risk of having to pay costs out of his own pocket. It merely directs that he shall discharge his duty upon the terms of being fully indemnified against costs. The words of the order are as plain as they can be. The particular nature of indemnity to be given is not mentioned, but it is to be given to the satisfaction of the Registrar. Nothing can be more just and reasonable. The appeal is wholly unreasonable, and it must be dismissed with costs.

Solicitors for Trustee: *Stibbard & Cronshey*, agents for *Tinley, Adamson, & Adamson, North Shields*.

Solicitors for Creditor: *Stocken & Jupp*.

C. J. B.

1875

Dec. 6.

*Ex parte WINDER. In re WINSTANLEY.*

*Act of Bankruptcy—Bill of Sale—Assignment of whole Property to secure past Debt and further Advances—Parol Agreement to make further Advances—Subsequent Advances made—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, sub-s. 2.*

An assignment of substantially the whole of a mortgagor's property to secure a previously existing debt and further advances is not an act of bankruptcy, if there is a contemporaneous parol agreement on the part of the mortgagee to make further advances to a sufficient amount, and such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the mortgagee to make any further advances.

*affirmed on appeal 11 Ch D 560*  
THIS was an appeal from a decision of the Judge of the Wigan County Court.

*John Winstanley* was a brassfounder at *Wigan*. Messrs. *Winder & Harrop* were wholesale lead merchants at *Manchester*. At the beginning of December, 1874, *Winstanley* was indebted to them in the amount of £287 for goods supplied by them to him for the purposes of his trade. He sent them an order for more goods, but they, having heard that he was surety to a large amount for a person named *Leyland*, who had then lately failed, before supplying any more goods, asked *Winstanley* for security for the debt

2 Ch D 798  
10 Ch D 323  
13 Ch D 106  
17 Ch D 27, 30, 2  
34  
22 Ch D 790  
743

which he owed them, and he agreed to give them a bill of sale of his stock-in-trade and other property. The bill of sale was executed on the 11th of December, 1874. It recited that *Winstanley* was the lessee of the *Caledonian Brass Foundry in Wigan*, for the residue of a term of fourteen years, computed from the 1st of April, 1867; that he was indebted to *Winder & Harrop* in the sum of £287 for goods supplied to him by them; and that they had agreed at his request to give him further time for the payment of the £287, and also to give him further credit for goods to be supplied to him by them, so that the whole amount owing should not exceed £500, upon condition that the moneys so owing or to become owing by him, with interest, should be secured in manner thereafter expressed. And it was thereby witnessed that in consideration of the £287, and of the sums (if any) thereafter to become owing by *Winstanley* to *Winder & Harrop*, he thereby assigned to them, first, all the machinery, engines, boilers, stock, plant, trade fixtures, chattels, and effects then standing and being in or upon his works and premises, and also all such things of a like nature which should at any time or times during the continuance of the security be erected on, added to, or brought upon the premises; secondly, all his household furniture and effects in his dwelling-house, and also all the household furniture and effects which should at any time thereafter during the continuance of the security be brought into his dwelling-house, or any other dwelling-house which he might occupy: To hold the same, subject to redemption on payment by *Winstanley* upon demand, or within twenty-four hours after demand, of the £287 and such further moneys (if any) as should for the time being be owing to *Winder & Harrop* under the covenants and provisions thereafter contained. There was a proviso that, if default should be made in payment of the moneys thereby secured, or any part thereof, for twenty-four hours after payment thereof had been demanded by the mortgagees, it should be lawful for the mortgagees to take possession of the property and to sell the same and pay themselves the moneys due to them. There was no covenant on the part of *Winder & Harrop* to supply *Winstanley* with any more goods on credit.

The bill of sale was registered on the 21st of December, 1874.

C. J. B.

1875

Ex parte  
WINDER.In re  
WINSTANLEY.

C. J. B.  
 1875  
*Ex parte*  
 WINDER.  
*In re*  
 WINSTANLEY.

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At the date of its execution *Winstanley*, in addition to the property comprised in it, possessed the lease of his business premises, book debts, which he estimated as worth £650, and the equity of redemption of his dwelling-house, which he valued at £100. At the same time he owed debts to the amount of £8000. Shortly after the execution of the deed *Winder & Harrop* supplied him with more goods on credit, and on the 10th of May, 1875, he owed them £560 3s. 6d. for goods supplied. On that day *Winder & Harrop* made a formal demand for payment, and on the 11th of May they took possession of the property comprised in the bill of sale. On the 10th of June, 1875, a bankruptcy petition was presented against *Winstanley*, the act of bankruptcy alleged being the execution of the bill of sale, and on the 23rd of June he was adjudicated a bankrupt. The debts proved in the bankruptcy amounted to £8183. Of these £7000 were debts which had been due at the time when the bill of sale was executed. On the 15th of July, 1875, the creditors resolved to sell the whole of the bankrupt's estate for £1350.

The trustee made an affidavit in which he stated that he had made a careful examination of the books of the bankrupt which had come into his hands, and that from them it appeared that at the time when the bill of sale was given, and for some time previously, the bankrupt was hopelessly and irretrievably insolvent. The trustee further stated that he had made careful inquiries in order to ascertain what property the bankrupt possessed at the date of the execution of the bill of sale, and that to the best of his knowledge, information, and belief the bill of sale included substantially the whole of the bankrupt's property, and the only property of the bankrupt not included in it consisted of book debts of small amount and questionable value.

On the 11th of August, 1875, the Judge made an order declaring that the bill of sale was an act of bankruptcy and void as against the trustee, and that the property comprised in it belonged to the trustee. From this order *Winder & Harrop* appealed.

*De Gex*, Q.C., and *Bagley*, for the Appellants:—

The evidence shews that the bill of sale did not comprise all the bankrupt's property; on the contrary, there was a very sub-

stantial exception. The execution of the bill of sale did not, therefore, amount to an act of bankruptcy.

But even if the deed did comprise substantially the whole of the property, still there was, as appears by the recitals, a parol agreement by *Winder & Harrop* to supply further goods on credit, and thus to enable the bankrupt to carry on his trade, and further goods beyond the amount agreed upon were in fact supplied. This is sufficient to support the deed: *Ex parte Bolland* (1); *Ex parte Chester* (2).

When a bill of sale is executed *bonâ fide* with the view of enabling

- (1) 20 W. R. 862. *Wm 74/87*  
 (2) C. J. B. 1874. Nov. 16.

*De Gex*, Q.C., and *E. C. Willis*, for the Appellant.

*Finlay Knight*, for the trustee.

*Ex parte* CHESTER.

*In re* DUNGATE.

THIS was an appeal from a decision of the Judge of the *Hastings* County Court.

*Dungate*, a trader, executed, on the 17th of April, 1874, a bill of sale of all his furniture and other effects mentioned in the schedule, to *Chester*, to secure the payment of a then existing debt of £160 and any further sums which might become due from *Dungate* to *Chester*. The schedule did not include by description *Dungate's* stock-in-trade or his book debts. There was no covenant by *Chester* to make any further advances. But *Chester* had made a verbal promise to *Dungate* that, if the latter would give the bill of sale, the former would continue to supply him with goods on credit up to the value of £200, and goods to a considerable amount were afterwards supplied. *Dungate*, in June, 1874, filed a liquidation petition. The bill of sale was duly registered, and possession was taken of the property by the mortgagee three days before the petition was filed. The Judge declared this bill of sale to be void as against the trustee. *Chester* appealed.

BACON, C.J., said that he could not find that the deed was an assignment of the whole of the bankrupt's property. It was an assignment only of what was mentioned in the schedule, and the stock-in-trade and book debts were not mentioned there. But, even if it had been otherwise, he thought that the execution of the deed was by no means an act of bankruptcy. The bankrupt was in need of further credit, and he induced the mortgagee to accept this security for his then existing debt, and for such further supplies of goods on credit as he might require. The clear consideration for the deed was the agreement that the mortgagee would continue to supply goods, and the goods so supplied were the very means which enabled *Dungate* to continue his business. The mortgagee was entitled to retain the property, and the order of the County Court must be discharged.

From this decision the trustee appealed, and on the 12th of December, 1874, the appeal was dismissed by the Lords Justices, on the ground that it was not proved that the whole of the debtor's property was included in the bill of sale.

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*Ex parte*  
 WINDER.

*In re*  
 WINSTANLEY.



C. J. B. a trader to carry on his business, it is not an act of bankruptcy :  
 1875 *Bittlestone v. Cook* (1); *Pennell v. Reynolds* (2). *Chase v. Goble* (3)  
*Ex parte* shews that when the deed does not in terms assign the whole  
 WINDER. property, the onus of proof is on those who assert that it did so  
*In re* in fact.  
 WINSTANLEY.

*Little, Q.C., and Smyly, for the trustee:—*

The execution of the bill of sale was the act of bankruptcy on which the adjudication was founded. The bankrupt was utterly insolvent when he executed it. The deed included all his tangible property. The only things omitted from it were a valueless equity of redemption, the lease of the business premises, which was probably worth nothing, and the book debts. Even if the latter were worth, as is said, £650, that was an insignificant sum compared with the bankrupt's then indebtedness of £8000. The deed was purely one-sided; the mortgagee was under no obligation to make any further advances. The making of further advances voluntarily, there being no obligation to make them, will not support the deed: *Lindon v. Sharp* (4). *Ex parte Bolland* (5) and *Ex parte Chester* are distinguishable from the present case. In *Bittlestone v. Cook* the debtor obtained a present actual advance, and the deed was not a security for a past debt. In *Pennell v. Reynolds* there was a present advance. *Ex parte Foaley* (6) is a case precisely in point, and there the bill of sale was held to be an act of bankruptcy.

BACON, C.J.:—

I think the order cannot be sustained. The statute prohibits a fraudulent transfer by a debtor of the whole or any part of his estate. It has to be considered, therefore, with regard to every transaction by which a debtor parts with his property, whether it has been fraudulent within the meaning of the statute or within the well-established law in bankruptcy. These are the facts which I have to consider in the present case before I impute fraud. The debtor was in trade; he owed £287 to the present Appellants, and he wanted further credit from them to enable him to carry on his

- (1) 6 E. & B. 296. *29 Jan 45. 750*  
 (2) 11 C. B. (N.S.) 709, 720.  
 (3) 2 Man. & G. 930.  
 (4) 6 Man. & G. 895.  
 (5) 20 W. R. 862. *WM 72/1*  
 (6) Law Rep. 3 Ch. 515.

trade. He asked them to give him further credit. They said, We will not give you credit unless you give us security, and thereupon he gives them a security. What fraud is there in that? How can I impute to the debtor a fraudulent intention? Not only can I find no trace of any fraudulent intention on his part, but the transaction seems to me to be as honest a one on both sides as can be conceived: most honest on the part of the debtor, who wanted to carry on his trade, whose only object in asking for the further supply of goods was that he might be enabled to carry on his trade. He cannot get that supply of goods except on the terms of giving a security, which the creditors have a good right to require from him, and so the bill of sale is executed. It is said that the bill of sale comprehended the whole of his estate. It is quite clear that, literally, it did not. How much it comprehended I have not, nor had the learned Judge of the County Court, the means of perfectly ascertaining. But it appears from the evidence given that at least £600 worth of book debts were excluded from the assignment, because all that the trustee says is that the book debts were of small amount and questionable value. When a trustee, who has the means of looking into the bankrupt's books and satisfying himself upon that particular point, says only that the book debts were of small amount and questionable value, I cannot prefer that vague statement of his, or indeed ascribe any weight to it, in opposition to the plain statement on the other side that they were worth £600 or £700. In considering the fraudulent motive which is ascribed to the bankrupt, which is the root and basis of this case, it is very material to observe that his object was to carry on his trade; that he secured that object by procuring a supply of goods upon credit from the present Appellants, and that he retained in his own hands the management of his book debts, because they were essential to the very object for which he asked the credit, viz., to enable him to carry on his trade. These facts are uncontradicted. So far from there being any fraudulent intention on the part of the debtor, I think that the arrangement is just that which any man in his circumstances might honestly and reasonably enter into, his object being to pay all his creditors—to pay them by the exercise of his trade, and therefore to acquire the means of carrying on that trade. There is not a word in the bill of sale which excites the slightest suspicion or doubt in my mind

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with regard either to the Appellants or to the debtor. It is said that it contains no covenant by the mortgagees to make further advances. It is not necessary that it should. One feature in the case of *Ex parte Foxley* (1), as well as in *Pennell v. Reynolds* (2), and many other cases, was the absence of a stipulation to make further advances. But here I find the plainest possible stipulation to do so, though it is true there is no binding covenant. But it would be inconsistent with the very nature of the deed that there should be a binding covenant to supply further goods in any event, for there is a power for the grantees at any time to demand payment of what is due to them, and if that payment was not made, of course they would have a perfect right to refuse to make any further advances. But there is a plain stipulation that the Appellants intend to make further advances. Nobody who reads the deed can doubt that it does not come within those cases where, there being no such stipulation, the decision was one way; but where, it is just to infer, that, if there had been such a stipulation, the decision would have been the other way. But it is not only that stipulation which I have to consider. I am bound also to consider what was the intention of the parties to this transaction. What are the facts? As soon as the deed was executed, supplies of goods were obtained by the debtor from the Appellants in the ordinary course of his trade; not sham advances—not bills, but a positive delivery of the goods which were necessary for, and were employed by the bankrupt in, the carrying on his trade, and this was continued down to the time when the Appellants found it necessary to put their security in force. I think the evidence is all on one side. There is no fact from which I can infer that the bankrupt intended to make a fraudulent disposition of his property. On the contrary, I think that he made a disposition of his property which he was perfectly competent to make; that he made an honest bill of sale, which is a valid security to the Appellants. The order of the learned Judge must, therefore, be discharged.

Solicitors for Appellants: *Shaw & Tremellen*, agents for *J. H. Dewhurst, Manchester*.

Solicitors for Trustee: *Chester, Urquhart, & Co.*, agents for *Dawson & Scowercroft, Bolton*.

*Ex parte* TREVOR. *In re* BURGHARDT.

C. J. B.

*Act of Bankruptcy—Assignment of whole Property to secure past Debt—Assignment of all separate Assets—Partnership Assets not included—Bill of Sale—Power to seize—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, sub-s. 2.*

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One of two partners in trade assigned the whole of his separate assets, and gave a power of attorney to assign all his personal property, as security for a previously existing separate debt. The partnership was at this time insolvent:—

*Held*, that the execution of the deed was an act of bankruptcy, notwithstanding the fact that none of the partnership assets were in terms included in the deed.

A bill of sale contained a provision that it should be void in case the mortgagor should pay the principal money thereby secured “upon demand, if and when the mortgagee should so require by a notice in writing,” and until payment of the principal should pay interest thereon half-yearly, and also a proportionate part thereof “to the expiration of the said notice, when the same shall be given.” And in default of payment power was given to the mortgagee to seize and sell the property comprised in the deed.

*Semble*, that the mortgagee was not entitled to seize on the same day on which he made a demand for payment, the demand not being at once complied with.

THIS was an appeal from a decision of the Judge of the *Manchester County Court*.

*Francis Burghardt* and *Augustus Kreuels* were merchants in partnership. On the 6th of April, 1875, they filed a liquidation petition, under which *C. R. Trevor* was appointed trustee.

On the 16th of March, 1875, *Burghardt* applied to *Robert Aders*, who had formerly been in partnership with him, for a loan of £700 on his private account. He said that he only wanted the money for a few days. *Aders* lent it to him. About the end of March *Aders* heard unfavourable rumours as to the solvency of *Burghardt's* firm, and on the 1st of April he wrote to him that, if he did not at once repay the temporary loan or give him a proper security for it, he should institute legal proceedings against him to recover it, and should also take steps in bankruptcy against him. No answer having been sent to this letter, *Aders* placed the matter in the hands of his solicitor, who, on the 2nd of April, issued a writ against *Burghardt* for the £700. Upon being



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—

served with the writ *Burghardt* offered to give a bill of sale of his furniture to secure the debt. This was agreed to, and on the 3rd of April the bill of sale was executed, and proceedings in the action were stayed.

The bill of sale contained a recital that, in consideration of *Aders* forbearing the further prosecution of the action for the £700, *Burghardt* had agreed to make the assignment thereafter contained for securing the repayment of the £700, and it was witnessed that *Burghardt* did thereby assign unto *Aders* all and every the household goods and furniture and other the chattels and effects then in, about, and belonging to the dwelling-house and premises then in the occupation of *Burghardt*, to have and to hold the same to *Aders*, subject to the proviso for redemption thereafter contained. And for the more effectually securing to *Aders* the payment of the £700 and interest, *Burghardt* appointed *Aders* his attorney, in his name at any time or times thereafter “to sign, seal, and deliver, or by delivery to make and perfect, any assignment or delivery of any goods, chattels, or other personal estate or effects not passing by the effect of this assignment, and to which *Burghardt* shall, before the satisfaction of this security, become beneficially possessed or entitled, and all the estate of *Burghardt* therein and thereto, to a purchaser or purchasers, or otherwise,” and also to demand, sue for, receive, and give valid discharges for any rights or claims in respect of all or any of the said goods, chattels, effects, and premises. There was a proviso making void the deed in case *Burghardt*, his executors or administrators, should pay to *Aders*, his executors, administrators, or assigns, the £700 “upon demand, if and when he or they shall so require by a notice in writing,” to be given or left for *Burghardt*, his executors or administrators, and in the meantime, until payment of the £700, pay interest thereon half-yearly, and “also a proportionate part thereof to the expiration of the said notice when the same shall be given.” And it was thereby declared that, in case default should be made in payment of the £700 and interest, or any part thereof, contrary to the tenor and effect of the aforesaid proviso, it should be lawful for *Aders*, his executors, administrators, or assigns, to take possession of and to hold and enjoy the goods, chattels, and premises thereby assigned,

and also to sell and dispose thereof, and of the goods, chattels, and effects to be comprised in any assignment to be made of the furniture, property, and effects of *Burghardt*, in pursuance of the power thereinbefore contained, or any part thereof, at discretion, and to repay themselves out of the moneys arising from the sale, the principal and interest due, and to pay over the surplus (if any) to *Burghardt*, his executors, administrators, and assigns. And it was declared that until default should be made "in payment of the £700, or any part thereof, at the time to be appointed by the notice to be given as aforesaid, or until default should be made in payment of the interest, or any part thereof, at the respective times thereinbefore appointed for payment thereof, it should be lawful for *Burghardt*, his executors and administrators, to retain possession of the goods, chattels, and premises thereby assigned. And *Burghardt* thereby covenanted with *Aders* that he, his heirs, executors, or administrators, would, on demand by the notice to be given as aforesaid, pay to *Aders*, his executors, administrators, or assigns, the £700, or so much thereof as might be then owing, with interest thereon; and in the meantime, and until such payment should be made, would pay to *Aders*, his executors or administrators, interest for the £700, or so much thereof as should for the time being remain unpaid, half-yearly.

Soon after the execution of this bill of sale *Aders* again heard unfavourable rumours about *Burghardt's* firm; and on the 5th of April he instructed his solicitor to take steps to enforce the security. On the same day his solicitor wrote a letter to *Burghardt*, demanding immediate payment of the £700 and interest, and stating that, in the event of payment not being made, *Aders* would proceed to enforce the security for his own protection. Payment not having been made, a Mr. *Mercer* on the same day took possession, on behalf of *Aders*, of *Burghardt's* furniture under the bill of sale, having previously made a demand on him personally for payment. The next day the liquidation petition was filed. The trustee afterwards applied to the Court for an order declaring the bill of sale void against him as an act of bankruptcy. It was admitted that *Burghardt* had no separate property other than the furniture comprised in the deed, and the trustee deposed that on the 3rd of April the debts of the partnership were

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C. J. B. £31,216, and that their assets would realize about £5000. Also  
 1875 that *Burghardt's* separate liabilities were £7462. The Judge held  
 that the bill of sale was valid.

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The trustee appealed.

*Little, Q.C., and Winslow, Q.C., for the Appellant:—*

The County Court Judge held that the bill of sale was good, on the ground that it included only *Burghardt's* household furniture. We contend, however, that the terms of the deed are large enough to include the whole of the mortgagor's personal property, even his interest in the surplus (if there had been any) of the partnership assets after payment of the partnership debts. The execution of such an assignment to secure a past debt was an act of bankruptcy.

Moreover, the seizure of the property which was made by *Aders* was not authorized by the deed. It was not intended that there should be a power to seize contemporaneously with the making of the demand for payment. Some interval was to elapse. The provision that interest should be paid "to the expiration of the notice" makes this clear.

[They were stopped by the Court upon the first point.]

*Jordan, and Finlay Knight, for Aders:—*

An assignment of a part of a trader's property to secure a past debt, if made under pressure, is valid: *Smith v. Timms* (1). Partners are in effect joint tenants of the partnership assets, without any *jus accrescendi*. Each partner is owner of the whole of the partnership assets. It is true that the equitable interest of each partner is only his share of the surplus of the partnership assets after payment of the partnership debts. But for the purpose of determining the question whether the execution of the bill of sale was an act of bankruptcy, the Court must look only at the visible tangible assets, not at the solvency or insolvency of the assignor. In *Smith v. Timms*, and other cases like it, of course the assignor was insolvent, or the question would never have arisen. When a man who is insolvent gives a bill of sale of part only of

(1) 1 H. & C. 849. *7 Jan 45. 10/15.*

his assets, if an account of his debts was taken it could not be said that he had any property not comprised in the bill of sale. But in such cases the Court has always regarded the amount of the actual visible assets, without any reference to the debts. So here, the partnership assets should be taken into account without any reference to the partnership debts. And if that is so, it is clear that the bill of sale did not comprise anything like the whole of *Burghardt's* property.

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BACON, C.J.:—

That this deed was an assignment of the whole of the bankrupt's estate is as plain as anything can well be, and, as it was made only to secure a previously existing debt, its execution was an act of bankruptcy. The deed purports to assign all the bankrupt's chattels in a particular house, and power is also given to the mortgagee to assign and deliver to a purchaser all the bankrupt's estate of any kind whatever. He either could or could not assign the partnership assets to secure his own private debt. If he could, he has done so by this deed. But in truth he had by law no power to do so. Under such an assignment the assignee would take no interest until all the partnership debts had been paid. Whichever way you look at it, the execution of this deed was an act of bankruptcy. At the time when it was executed the firm, as well as *Burghardt*, was utterly insolvent. The possibility, therefore, of there being anything to come from his interest in the surplus of the partnership assets was out of the question. The execution of the deed was as plain an act of bankruptcy as was ever committed.

Though I did not hear the argument out upon the construction of the deed, I do not wish to part with the case without saying that, according to my present opinion, the mortgagee had no right to take possession when he did. The condition upon which his power to do so was to arise had not been complied with. The appeal must be allowed.

Solicitors for Trustee: *Johnson & Weatheralls*, agents for *E. Storer, Manchester*.

Solicitors for Mortgagee: *Rowley, Page, & Rowley, London and Manchester*.



C. J. B.

*Ex parte COX. In re REED.*

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 Dec. 20.
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Reputed Ownership—Order and Disposition—Post-nuptial Settlement of Furniture—Costs of Appeal—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 15 (sub-s. 5), 91, 92.

A husband and wife, at a time when the wife was under age, executed a deed which purported to convey freehold property of the wife to a purchaser for £500. The deed was not acknowledged by the wife. The husband received the £500. The purchaser afterwards contracted to sell the property, and his sub-purchaser required the concurrence of the wife in the conveyance to him. The wife, who was then of age, refused to concur, unless the husband would execute a bill of sale of his furniture to a trustee for her, to secure the payment of £425 for her separate use. This was done by the husband; and she then executed the conveyance to the sub-purchaser. The bill of sale was registered. Possession of the furniture was given to the trustee by delivering to him a silver fork in the name of the whole, and the keys of the house where the furniture was. But the furniture remained, until the husband filed a liquidation petition, in the house which was occupied by him and his wife, and it was used by them:—

Held, that the execution of the bill of sale amounted to a purchase of the wife's concurrence in the conveyance; that the possession was consistent with the terms of the deed; and that the wife's trustee was entitled to the furniture as against the trustee under the liquidation.

THIS was an appeal from a decision of the Judge of the *East Stonehouse* County Court.

George Palmer Reed was a wine merchant at *Compton Gifford*. In the year 1869 the business was carried on by him in partnership with his father, and the firm wanted to borrow money from their bankers, but the bankers declined to lend any money without security. *G. P. Reed's* wife was entitled in fee to a freehold house in *Plymouth*, and he arranged with his father that the father should purchase the house from the wife for £500, and that the title deeds should then be deposited with the bankers as security for a loan to the firm. Accordingly, on the 3rd of April, 1869, a deed was executed by *G. P. Reed* and his wife, by which they purported to convey the house to the father for £500. This sum was never paid to the wife, but credit was given for it to *G. P. Reed* in the partnership accounts. When this deed was executed, *Mrs. Reed* was under the age of twenty-one, and when she went to acknowledge the deed before a Commissioner he refused to take her

acknowledgment on the ground of her minority. The deed was consequently not acknowledged, but it was treated as a good deed, and was deposited with the bankers as security for a loan made by them to the firm.

Reed's father died in 1874, and in 1875 *Reed*, wishing to pay off the debt due to the bankers, contracted to sell the house. The purchaser took the objection to the title that the deed of April, 1869, had not been acknowledged by Mrs. *Reed*, and required that she should confirm the deed. Her husband then asked her to execute a deed of confirmation, but she, on the advice of her solicitor, refused to do so, except on the condition that the husband would give her security for the £500. Ultimately he consented to execute a bill of sale of his furniture to secure the payment of £425 to a trustee for her benefit, and on this bill of sale being executed, she executed the required deed of confirmation. The bill of sale was executed on the 30th of March, 1875. It was never registered. The trustee to whom the furniture was assigned discovered after its execution that it did not give him power to take possession till a year after its date, and he required another deed to be substituted for it. This was done. The substituted bill of sale bore date the 24th of May, 1875. It was made between *Reed* of the first part, his wife of the second part, and *George Cox* of the third part. It contained a recital that the wife, being seised in fee of the house in *Plymouth*, did, at the request and for the benefit of her husband, and during her minority, sell and dispose of the same, and that by a deed dated the 3rd of April, 1869, she assumed to convey the said house to *Joseph Reed* and his heirs; and a recital that on a subsale of the house by the trustees of *Joseph Reed*, the purchaser required the execution of a deed of confirmation by the wife, but that, inasmuch as she had received no consideration for the conveyance to *Joseph Reed*, *G. P. Reed*, in order to obtain a confirmation of the conveyance, had agreed to make and execute to *Cox*, as trustee for, and for the benefit of the wife, a mortgage of his furniture as thereafter mentioned for £425, being the amount for which the house had then been sold, and in consideration thereof the wife had agreed to concur in the deed of conveyance to the sub-purchaser; and it was witnessed

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that in pursuance of the said agreement *Reed* (at the request of his wife) assigned to *Cox* all the household furniture and effects in his dwelling-house, to hold the same, subject to a proviso for making void the deed, upon the trusts and with the power therein-after expressed. And there was a proviso that, if *Reed* should pay to *Cox* the £425, with interest, on demand, the deed should cease and be void, and a further proviso that, in case default should be made in payment of the £425 and interest, or any part thereof, on demand, it should be lawful for *Cox*, at the request of Mrs. *Reed*, to sell and dispose of the property ; and *Cox* was to stand possessed of the moneys arising from the sale on trust, first, to pay the expenses of the sale, and next, to pay to and for Mrs. *Reed*, and for her sole and separate use and benefit, the sum of £425 and interest, or so much thereof respectively as should be then due, and as to the surplus on trust for *Reed*. The attestation clause stated, that at the time of the execution of the deed full and complete possession of the furniture and effects was given by the delivery of one silver fork in the name of the whole, upon the trusts in the deed mentioned. This deed was duly registered under the *Bills of Sale Act*. The keys of the dwelling-house were also delivered to *Cox* before the 25th of May. The furniture remained after the execution of the deed in the house, which was occupied by *Reed* and his wife, and it was used by them.

On the 25th of May, 1875, a sheriff's officer attempted to levy an execution on the furniture under a writ issued against *Reed*, but Mrs. *Reed* refused to allow him to do so, telling him that the furniture was hers, not her husband's. The officer entered into possession, and on the 29th of May a formal notice was served on him on behalf of *Cox*. An interpleader summons was then issued, and an interpleader issue was directed to be tried at the summer assizes between *Cox* and the execution creditor ; but before this could be done, *Reed*, on the 30th of July, 1875, filed a liquidation petition. The trustee under the liquidation claimed the furniture, and on the 17th of November the Judge of the County Court made an order that the trustee was entitled to the sum of £267, the price of the furniture, which had been sold by arrangement. *Cox* appealed.

G. W. Lawrance, for the Appellant:—

The wife's concurrence in the conveyance to the sub-purchaser was a valuable consideration sufficient to support the bill of sale, and to prevent its being avoided either as a fraudulent preference under sect. 92, or a voluntary settlement under sect. 91 of the Act. The only question, therefore, is whether there was a change in the possession of the furniture sufficient to exclude the operation of the reputed ownership clause (sect. 15, sub-sect. 5). If the settlement had been an ante-nuptial one, what took place would have been sufficient: *Jarman v. Woolloton* (1); *Simmons v. Edwards* (2). The principle of these cases applies equally to the question of possession under a post-nuptial settlement. And in *Ashton v. Blackshaw* (3) it was held that a post-nuptial settlement of furniture would have been good as against the creditors' assignee of the husband if it had been registered. Here the deed has been registered.

Horton Smith, for the trustee in the liquidation:—

The original conveyance of the freehold house conveyed, at any rate, the husband's interest in it during the joint lives of himself and his wife, an interest which he was competent to convey alone: *Gleaves v. Paine* (4); *Robertson v. Norris* (5). The whole purchase-money was received by the husband, and it must be assumed that the wife consented to his taking that part of it which represented her interest. If any subsequent confirmation by the wife was required, that was for the benefit of the purchaser, from whom, not from the husband, the consideration ought to have moved. The bill of sale ought, therefore, to be considered as voluntary on the part of the husband, and void under sect. 91 or sect. 92 of the Act.

BACON, C.J.:—

In my opinion this bill of sale was not, properly speaking, a settlement at all. The transaction was a bargain by the husband

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COX.

In re
REED.

(1) 3 T. R. 618.

(2) 16 M. & W. 838.

(3) Law Rep. 9 Eq. 510.

(4) 1 D. J. & S. 87.

(5) 11 Q. B. 916.

9 Jan 45. 366

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Ex parte

Cox.

In re

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with the wife to enable him to perfect the title of the purchaser from him of that estate which was the wife's, and which, by reason of the deed which purported to convey it not having been acknowledged by her, had never ceased to be her estate. He bought her concurrence in and confirmation of the conveyance, and in exchange for it he agreed to transfer his furniture to a trustee for her. That was no fraud upon his creditors. The fact that he was insolvent at the time did not render him incompetent to purchase the confirmation of his wife, any more than it would have incapacitated him from buying a horse or any other chattel. The subsequent possession of the furniture appears to have been consistent with the terms of the deed. The deed was duly registered under the *Bills of Sale Act*, and the wife's trustee is entitled to the money which now represents the furniture. The appeal must be allowed, but the transaction is so doubtful I cannot give the Appellant his costs.

Solicitors for Appellant: *Park Nelson & Morgan.*

Solicitors for Trustee: *Lanfear & Stewart.*

In re EUROPEAN ASSURANCE SOCIETY.

HORT'S CASE.
GRAIN'S CASE.

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Aug. 3;

Nov. 3, 5, 25.

Insurance Company—Dissolution—Transfer of Liabilities—Unincorporated Company—Power to make Calls—Winding-up Acts.

By the deed of settlement of the *A.* insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the *A.* company, and were to transfer to that other company a sufficient amount of the assets of the *A.* company. The *A.* company was accordingly dissolved, and a portion of its funds was transferred to the *B.* company, which covenanted to satisfy the liabilities of the *A.* company. Full notice of this transaction was sent to the policy-holders of the *A.* company; and in the policies of that company it had been declared that the funds and property of the company should alone be liable to make good the claims under the policy, and the deed of settlement was also referred to. Both companies were wound up, and came under the *European Assurance Society Arbitration Acts*:—

Held, that the *A.* company had, without the consent of the policy-holders, a right to dissolve itself and transfer its liabilities to the *B.* company; and that a policy-holder could claim only against the *B.* company.

Per Mellish, L.J.:—On such a policy the holder could not have sued the shareholders separately; nor, after the company was dissolved, would there have been any means of compelling the shareholders to pay calls on their shares, the company being unincorporated, and having been formed before the passing of the Joint Stock Companies Acts and the Winding-up Acts; nor had the passing of those Acts affected the rights and liabilities of the parties.

THE *Royal Naval, Military, and East India Company Life Assurance Society* was formed under a deed of settlement dated the 1st of January, 1839. The company was not a corporation, and the deed was in the then usual form of mutual covenants between the shareholders and certain trustees, as stated in the judgment of the Lord Justice *Mellish*. The 132nd clause of the deed provided for the insertion in every policy and contract of a clause that no director or proprietor of the company should be liable to any claim thereunder, beyond the amount of the unpaid part of his or her share in the subscribed capital, in the company. The 131st clause provided that the funds and property of the company for the time

34 D. 427
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being unapplied and undisposed of should alone be answerable for the claims of persons assuring with the company, and of other creditors of the company; that the directors signing policies should be personally liable for the application of the funds and property of the company in discharge of the money secured by the policies, and not otherwise; and that directors and proprietors should not be personally liable beyond the amount of the unpaid part of their respective shares. The 172nd clause provided that it should be lawful for an extraordinary court of directors to recommend a dissolution of the company, whereupon extraordinary courts of the company should be called, and if a resolution for dissolving should be entered into at one extraordinary court and confirmed at a second, then the company should be dissolved, and the business concluded. The 173rd clause was, "That immediately upon the dissolution of the company, the court of directors shall, out of the funds or property of the company, pay and satisfy all immediate claims and demands on the company arising from assurances, annuities, or other contracts or engagements, and shall (but subject and without prejudice to the provision hereinafter contained) obtain from the directors or managers of some other assurance company or society an undertaking to pay and satisfy all or any such as the court of directors may think proper of the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts or engagements, when and as the times for the payment and satisfaction of the same shall respectively arrive, and shall cause to be transferred to some of the trustees of such other assurance company or society so much of the funds or property of the company as shall be agreed upon between the contracting parties as sufficient, with the premiums that may become payable in respect of all or any of the existing policies, to enable the company or society from whose directors or managers the undertaking shall have been obtained to comply therewith, and shall make such arrangements with the said directors or managers in regard to the said undertaking as the court of directors shall in their discretion think fit, and shall cause to be done and executed all such acts, deeds, and things as, in the opinion of the court of directors, shall be necessary or advisable for carrying the said arrangement into effect. Provided.

nevertheless, that the court of directors shall be at liberty to continue for such period as they may think fit the business of the company so far as regards all or any of the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts, and the receipt of premiums, and the benefits of any contract with the company And if any funds or property of the company shall remain after answering the several purposes aforesaid, the court of directors shall cause the same, or so much thereof as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or of which the same shall consist, to be paid and distributed at such time or times as they shall think fit to and amongst the proprietors and other holders of shares in the capital of the company, according to their respective rights and interests therein; and, notwithstanding the dissolution of the company, these presents and the provisions herein contained, and all powers, privileges, rights, and duties of the proprietors and other holders of shares, including the powers to call and hold extraordinary general courts, and the powers to call for and enforce the payment of further instalments on shares, shall, until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final division shall have been made of the residue, if any, of such moneys as aforesaid, remain and continue in full force, so far as the same may be necessary for winding up the concerns of the company, and for enabling the court of directors to dispose of the funds and property of the company, and to satisfy and provide for such claims and demands, and to make such payments and disbursements as aforesaid."

On the 11th of December, 1855, Mr. *Hort* effected with the *Royal Naval Society* an assurance on his own life for £200. The policy stipulated that, on payment of the premiums as therein mentioned, "the capital, stock, and funds of the society shall, according and subject to the provisions of the deed of settlement of the said society, be liable to pay to the executors, administrators, or assigns of the said assured, within three calendar months after proof satisfactory to the directors of the said society shall have been given of the death of the assured, the sum of

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£200." This was subject to a proviso, "that the subscribed capital and other the stocks, funds, securities, and properties of the society which at the time of any demand made in respect of this policy may remain unapplied and undisposed of in pursuance of the trusts, powers, and authorities contained in the deed of settlement of the said society, shall alone be liable to make good the claims and demands upon the society in respect of this policy, and that the directors signing this policy shall not be responsible to any greater extent than the funds and property of the society in their hands or power at the time of the claim being made shall be competent to discharge, and that no proprietor shall in any event whatever be liable beyond the amount of the unpaid proportion of his share or shares in the said subscribed capital."

On the 5th of February, 1857, Mr. *Hort* effected another assurance with the society for £300, the policy being in similar terms.

In August, 1866, negotiations were carried on for the transfer of the business of the *Royal Naval Society* to the *European Assurance Society*, and extraordinary courts of proprietors of the *Royal Naval Society* were duly held, at which resolutions were duly passed approving of the transfer. In the meantime, on the 18th of August, 1866, a circular was sent by the chairman of the *Royal Naval Society* and was received by Mr. *Hort*. It stated that the chairman and his colleagues had been anxiously considering whether the interests of the assured and of the proprietors would not be maintained and promoted by the union of the business with that of some larger company, and that they had arrived at the conclusion that such would undoubtedly be the case. That the business of the society was restricted, but was and ever had been in a sound and healthy state, and would be a valuable accession to any office of greater means. It then proceeded thus: "Under this belief we have entertained overtures from a company of very large business and undoubted security who are willing to take over the society's business and responsibilities under an arrangement which, after adequately securing, as the primary consideration, the society's policy-holders, will give the shareholders a return of their original paid-up capital in cash or, at their

option, in shares of that company, and in the latter case with a considerable bonus. The constitution of all modern companies provides for these advantageous unions or amalgamations, and this proposed arrangement virtually amounts to union or amalgamation with the company referred to. The society's deed of settlement, though not expressly providing for union or amalgamation, does in effect render it practicable by a dissolution of the society; and after due deliberation we have deemed it our duty to call an extraordinary general meeting of the shareholders to take the subject into consideration, as indicated in the annexed notice, and we trust the movement may receive your cordial approval and co-operation."

The arrangement between the companies having been approved of at the courts of proprietors, in order to carry it into effect two indentures were made and executed. By one indenture, dated the 17th of September, 1866, and made between the two companies, after reciting the due holding of the meetings and the passing of the resolutions for dissolving the *Royal Naval Society*, and that the presumed value of the assets of the *Royal Naval Society* was agreed to be taken at £98,060, of which £83,951 should be taken as the proportion which, with the premium to become payable, would enable the *European Society* to pay and satisfy the liabilities and engagements of the *Royal Naval Society*, and reciting an agreement that such proportion of the property and assets should be transferred to the *European Society*, and that the property and assets so to be transferred had been transferred to the *European Society*, it was witnessed that the *European Society* and its directors covenanted with the trustees of the *Royal Naval Society*, that the *European Society*, and the property and assets of the same company, including the assets and property of the *Royal Naval Society* made over as aforesaid as part thereof, should undertake and be bound by and pay and satisfy all the liabilities on life or annuity policies granted by the *Royal Naval Society* and on foot on the 6th of August, 1866, and all other debts, liabilities, claims and demands whatsoever, whether present or future, of, upon, or against the *Royal Naval Society*. And also that the *European Society* would, out of the property and assets of the *European Society*, inclusively of the assets of the *Royal Naval*

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“Should you, however, have been accustomed to pay your renewal premium through an agent, you will still be able to do so, as arrangements will be made by the *European Society* to continue the agents of the *Royal Naval and Military Society*.”

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The letter from the manager of the *European Society* was to a similar effect.

Mr. *Hort* sent in his policies to the office of the *European Society*, and they were returned to him with indorsements in the following form, sealed with the seal of the *European Society*, and signed by three of its directors, on the 11th of April, 1867:—

“Memorandum.—It is hereby declared that, subject to the proviso hereunder stated, the funds and property of the *European Assurance Society of London*, as provided for in the deed of settlement of the said society, shall be liable for the payment of the sum of £200 (without profits) assured by the within policy with the *Royal Naval, Military, and East India Life Assurance Society of London* to the person or persons legally entitled to receive the same. Provided always that the future premiums payable in respect of the said policy be duly paid to the said *European Assurance Society* at the time and in the manner set forth in the said policy.

“Printed receipts of renewal premiums issued from the chief office will alone be admitted as valid.”

The *European Society*, immediately after the transfer of the business of the *Royal Naval Society*, removed their business to the offices of the *Royal Naval Society*. Mr. *Hort* continued to pay his premiums at the office, and the receipts were given by the *European Society*, having on them the words “*Royal Naval Society Department*.”

On the 12th of January, 1872, an order was made for winding up the *European Society*; and on the 1st of March, 1872, an order was made for winding up the *Royal Naval Society*.

The affairs of both the companies came within the *European Assurance Society Arbitration Act*, 1872 (35 & 36 Vict. c. cxlv.), and Mr. *Hort* made a claim in respect of his policies against the *Royal Naval Society*. His case came before Lord *Westbury* as arbitrator under the Act. Lord *Westbury* held that Mr. *Hort* had

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 1875 of the *Royal Naval Society*, and made an order that Mr. *Hort* was
 HORT'S CASE. entitled to prove on both his policies against the *Royal Naval Society* without prejudice to any claim against the *European Society*.

The official liquidator of the *Royal Naval Society* appealed, and the case then came before Mr. *Reilly*, the arbitrator appointed under the *European Assurance Society Act*, 1875 (38 & 39 Vict. c. clvii.), who, under the powers of that Act, stated a special case for the opinion of the Court of Appeal in Chancery.

The case came on for hearing on the 3rd of August, 1875.

Higgins, Q.C., and *Romer*, for the official liquidator:—

The arrangement between the two companies was within their powers, and the policy-holder might have remained with the *Royal Naval Society*, but he has accepted the conditions and has had his policy indorsed, so that he cannot now turn round and claim against the *Royal Naval Society*: *Griffith's Case* (1); *Spencer's Case* (2). He might have objected, but he did not: *Ex parte Blood* (3). The *Royal Naval* had power to transfer their liabilities, and they did so. Mr. *Hort*, no doubt, had a charge on the assets, but he could not compel the *Royal Naval Society* to go on until the sum secured became due: *In re Times Assurance and Guarantee Company* (4). The proof ought to be allowed against the *European Society* only.

Ince, Q.C., and *Millar*, for Mr. *Hort*:—

Our policy is a clear contract with the *Royal Naval Society*, which gives us a perfect *prima facie* case. The deed of settlement contemplates not that the policy-holders shall be turned over to the new company, but that the trustees of the old company will on its dissolution obtain a guarantee which shall shield the proprietors of the old company, but the liability of the proprietors to the policy-holders remains as it was. The circulars state that the policy-holders will have a further security, and they could not have suspected that they were, instead of getting anything further,

(1) Law Rep. 6 Ch. 374.

(2) Ibid. 362.

(3) Law Rep. 9 Eq. 316.

(4) Ibid. 5 Ch. 381.

to lose all their rights: *In re Manchester and London Life Assurance and Loan Association* (1).

The company must state clearly what they intend, or else the policy-holder is not bound: *In re Family Endowment Society* (2). The adoption of a new firm by a creditor does not absolve the old firm, and both may remain liable: *Devaynes v. Noble* (3); *David v. Ellice* (4).

By the deed of settlement the *Royal Naval Society* might continue to exist, and the policy-holders might reasonably suppose that it would do so.

Higgins, in reply.

Their Lordships then reserved judgment until they had heard other cases of a similar nature which were to come before them.

GRAIN'S CASE.

COLONEL *GRAIN* had, in 1861, effected a policy of insurance on his own life with the *Royal Naval Society*, and the circumstances of his case were similar to those of *Mr. Hort's Case*, except that Colonel *Grain* had not sent his policy to be indorsed. There was, however, a memorandum, indorsed and signed by the manager of the *European Society*, that on payment of an additional premium Colonel *Grain* might go to *Jamaica* without vitiating his policy.

The claim of Colonel *Grain* came before Lord *Romilly*, who decided that Colonel *Grain* had not accepted the liability of the *European Society*, and could claim against the *Royal Naval Society*.

The official liquidator appealed, and the appeal came before Mr. *Reilly*, who stated a case for the opinion of the Court of Appeal in Chancery. The case came on for argument on the 3rd of November, and again on the 5th and 25th of November.

Higgins, Q.C., and *Romer*, for the official liquidator:—

The deed of settlement is incorporated in the policy, and the policy-holder is bound by its terms. The company must end at

(1) Law Rep. 5 Ch. 640.

(2) *Ibid.* 118.

(3) 1 Mer. 529.

(4) 5 B. & C. 196.

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 1875 followed. The proprietors are liable only until dissolution. Colonel
 GRAIN'S CASE. *Grain* cannot say that he paid the premiums to the *European Society* as agents for the *Royal Naval Society*, for the circulars shew it was not so, and at all events the indorsed memorandum is conclusive on that point. The extra premium was paid to the *European Society*. He had full notice of the transfer and knew what was done.

Jackson, Q.C., and Millar, for Colonel Grain:—

The dissolution of the company was like that of a private partnership, and cannot release the company. *In re Waterloo Life Assurance Company* (1) has not been approved of. We do not claim against the proprietors but against the company, and the liquidator must make calls or get the money as he thinks fit. The deed of settlement never contemplated insolvency, and the case has not been provided for.

No doubt where there is a provision of this kind a policy-holder cannot, as in *Kearns v. Leaf* (2), obtain an injunction to restrain the company from parting with the assets, but that is all. We say that Colonel *Grain* cannot, *nolens volens*, be made a policy-holder in another company, and that he has done nothing to shew that he accepted those terms. The *European Society* were merely agents for the *Royal Naval Society*, and as such received the regular premiums, and the extra premiums when payable. To whom else could Colonel *Grain* apply? If the fund transferred had been set aside or ear-marked it might be different, but it was not.

Higgins, in reply.

LORD CAIRNS, L.C.:—

Before disposing of *Grain's Case* it is necessary to dispose of *Hort's Case*, which was argued at the last sitting, and what is to be said on that case will, to a great extent, if not altogether, govern *Grain's Case*.

Hort's Case was this:—[His Lordship then stated the facts of

(1) 33 Beav. 542. *10 June 1857* 46 (2) 1 H. & M. 681.

Hort's Case, and read the parts of the policy and deed of settlement which bore upon the question :—]

The policy which Mr. *Hort* accepted was, therefore, a policy not merely providing for payment, on his death, of a specific sum of money, but providing that that sum should be paid only by the application of the capital of the company, and that that capital was to be applied according to the provisions of the deed of settlement of the company, whatever those provisions might be.

Now, it may be said that it is an unwise thing for any man to take a contract for the insurance of his life, not making simply some person or some corporation liable to pay the sum insured, but taking as his only security for the payment of the sum, the promise to administer the funds of the company according to the provisions of the deed of the settlement, which very probably the person insured has not taken the trouble to read. And it may be said that it is equally an unwise thing for a person to insure his life with a company and to enter into a contract by which his only remedy is against the capital, or a fund which, according to the deed of settlement, may be handed over to another company, the other company taking the liability of paying on the policies of insurance.

All these things may be said, and with some truth ; but there is something to be said on the other side. It is not, after all, very extraordinary that those who are content with insuring their lives, and taking no other security than that which is derived from the character of the directors and the confidence that they will administer the fund in their hands rightly and honestly and wisely, may reasonably say : “If those directors in whose honesty and wisdom we have confidence think it right, think it more economical or more likely to conduce to the prosperity of the business to hand over their business to another company, to hand over their funds and their obligations on the policies, they are at liberty to do so ; and we, the policy-holders, may be satisfied to be bound by any such arrangement.” There may be considerable reason for a policy-holder entering into a contract of that description, and the more so because it is to be observed that unless some arrangement of this kind for the transfer of the business of insurance companies is inserted in their deeds of settlement, there is no practical

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C. A. mode by which an insurance company can ever come to an end.
1875 Other companies may wind up their work and may cease to carry
GRAIN'S CASE. on business, but an insurance company, if some arrangement of
this kind cannot validly be made, must go on for an indefinite
period of time, or at all events for the period which will be covered
by the aggregate lives of all the parties insured.

However, whether the contract be wise or unwise, that is the contract which Mr. *Hort* entered into; a contract which, as I read it, contains a power given to those who contracted with him, in the due execution of their duty, provided they do so honestly and *bonâ fide*, to make over their funds to any other society which will take upon itself the obligation of paying on the policies which have been effected.

Now, what was done in this case? The *Royal Naval Society* agreed to make over their business to the *European Society*, and in pursuance of that agreement a deed of arrangement, dated the 17th of September, 1866, was executed. [His Lordship then read the parts of the deed which have been hereinbefore stated.] Therefore there is an arrangement which has followed literally and properly the provisions of the deed of settlement of the *Royal Naval Society*. The *Royal Naval Society* have obtained a company to stand in their place, and to take on themselves the liabilities on the policies. The *Royal Naval Society* and the *European Society* have made an estimate of the sum adequate to provide for those liabilities, and that sum out of the assets of the *Royal Naval Society* has been handed over to the *European Society*; the remainder of the property of the *Royal Naval Society* has been divided, and the company has been dissolved as far as it could properly be so, and has ceased to carry on any business. There is no imputation on the good faith of that arrangement. It is not suggested that it was done unfairly or improperly to get rid of their liabilities; it was done openly; not in a corner, but openly announced. Meetings were openly held, and the parties professed to follow, and evidently thought they were following to the letter, the deed of settlement under which they were acting.

That being the course which the companies took as between themselves, we now turn to the communications which they made to the policy-holders. And before reading them, I may point out

that if this, which was done by the company, was *intra vires*, and was warranted by the contract of insurance which Mr. *Hort* entered into, this case is not, in any respect, a case of what has been termed "novation"—it is a case of a different kind—a case which simply raises the question whether that which was done by the *Royal Naval Society* was what they were authorized and empowered to do as a matter of right, and whether Mr. *Hort* was bound to submit to it when done? If he was bound, then even if he refused to submit, his refusal would have been vain. Still more if he has acquiesced, and the deeds of arrangement and transfer have been actually carried into effect.

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On the 18th of August, 1866, this circular was sent from the *Royal Naval* to Mr. *Hort*.

[His Lordship then read the terms above stated, and observed that nothing could be more frank than the way in which the circular appealed to the deed of settlement of the *Royal Naval Society* as the authority for what was being done. His Lordship then read part of the circular of the 18th of September, 1866, and said that he did not look on this as the proposal of three alternatives, but as saying that the policy-holder might please himself as to the form, but the result would be the same, and be the result contemplated by the deed of settlement. His Lordship then read the indorsement on the policies.]

That indorsement appears to carry the matter no further than if it had not been made. It merely makes the funds of the *European Society* liable, which they clearly were by the contract between that society and the *Royal Naval Society*.

It appears to me, without looking to the terms of the receipts which were subsequently given by the *European Society*, that this has proved to be a very plain case. Mr. *Hort's* original contract was not that in all events and under all circumstances he would have a claim against the *Royal Naval Society*, but was a contract in its nature open to the chance of shifting. If pursuing the course laid down by the deed, by which he was content to be bound, the *Royal Naval Society* entered into an engagement to dissolve, and handed over sufficient property to another company, and took the undertaking of the other company to provide for their liabilities, they were at liberty to make over to

C. A. the other company, and upon those terms, the funds against which
 1875 alone Mr. *Hort* had a claim. Upon that footing they informed
 GRAIN'S CASE. Mr. *Hort* that they had acted, and thus directed him to pay the
 — premiums to the new company. He had clear notice of what was
 being done, and I am of opinion that he could not have objected.
 But he did not object; he acted on the directions, and paid the
 premiums accordingly. In my opinion, therefore, he is a creditor
 of the *European Society*, and not of the *Royal Naval Society*.

JAMES, L.J. :—

I am of the same opinion. At the time when the *Royal Naval Society* accepted the proposal of Mr. *Hort*, and granted him a policy, there was no general mode by which these companies could be incorporated. They were an unincorporated body of persons, but although they were in point of law and in point of fact not absolutely a corporation, it is quite clear that, as between all the parties to these deeds of settlement, it was their intention to make themselves for all practical purposes as like a corporation as in the then state of the law was possible to be done by a mere contract. It was intended that they should not be a partnership of the particular individuals existing at that time, but that they should be a body of persons with continuous and perpetual succession (until dissolved according to the terms of the constitution of their own body) as between themselves, and as between them and all persons having dealings and transactions with them. The same principle was the basis of all the arrangements. Nobody effecting a policy of insurance with such a society as this ever intended to be left, or ever thought he was left, or that his executors would be left after his death, to the necessity of bringing an action against the survivors of the individuals who happened to constitute the particular body of persons on the day on which his policy was signed. The intention was that it should be a bargain with a *quasi* corporation, and a liability against the *quasi* corporation and against the persons who at the time when the policy ripened into a *debitum* would be the persons to provide for it.

Another consideration is not immaterial in this matter—that is, that these contracts are contracts for life assurance, and that every life assurance society—there may be others as well—but

every life assurance society is substantially and materially a mutual life assurance society. The method by which it is intended to provide for payment of the sums secured by the policies is by investing the premiums and accumulating the money so as to form a fund out of which the claims are ultimately to be satisfied. The capital of the shareholders, and the sums which the shareholders undertake and make themselves liable to pay, are in truth only a guarantee against the possible contingency of the accumulated insurance fund being insufficient.

That being the state of things, if in any such office a sufficient amount of business is not obtained to begin with, or if the business falls off, so that the assets and the probable future income of the society will not be sufficient to provide amply for all the liabilities which it has entered into and is entering into, the honest and proper course is to get some larger, stronger, and more prosperous society to accept the liabilities of the unprosperous society which, out of its assets, would pay a sufficient sum to induce the more prosperous society so to do. In fact, this Court has, in more than one instance, done this very thing in winding up an insurance company, and has in other instances sanctioned such a bargain when incomplete. In truth, to do otherwise would be to commit a fraud on the younger lives, who would be left in the same position in which a great number of poor persons are often left in connection with friendly societies where their rates have been insufficient and the funds are exhausted in paying to the older members, so that the younger members are left unprovided for. Therefore it is not that there is anything wrong in the provisions, because it was a reasonable and proper provision to make for the safety, not only of the shareholders, but of the persons insured.

When, with these considerations, we come to the construction of the deed, it appears to me that if we do not feel ourselves compelled to put a strained construction against the shareholders, and in favour, as it would ultimately be, of the policy-holders—if we do not feel constrained to do otherwise than put the ordinary construction upon the deed—I agree with the Lord Chancellor that, beyond doubt, the construction of the deed is, that the policy authorized the society to transfer its business, including all its

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C. A. liabilities, to the other society, and that in this case that transfer
 1875 was duly effected. It seems to me that there really is nothing
 GRAIN'S CASE. more unreasonable in the whole body of shareholders transferring
 their liabilities to another whole body of shareholders than there
 is in a shareholder, or every shareholder one after another, going
 out of the society and transferring his shares to a new shareholder,
 who will not be the person with whom the policy-holder effected
 his security.

I entirely agree with the Lord Chancellor that it is a question of the construction of the deed. Possibly the deeds were not sufficiently considered in some former cases in which the thing was treated too much as a mere question of "novation," a word which was unfortunately introduced into these cases, and which has led to a considerable amount of expense, which must fall upon some of those who are concerned.

MELLISH, L.J. :—

I also have come to the conclusion that, according to the true construction of the deed, the *Royal Naval Society* had a right, without the consent of the policy-holders, to transfer to a proper company the entire assets of the *Royal Naval Society*; and after they had done so, and had obtained from the new company a proper covenant making the new company liable on the policies, then the members of the old company were discharged.

Now it is necessary, as has been said already, to look carefully at the exact terms of this policy, and the exact terms of the deed of settlement, and at the position of the policy-holder. The capital, stock, and funds are alone to be liable, and no proprietor is to be liable beyond the amount of his shares in that capital stock. It was held by the Exchequer Chamber, in the case of *Hallett v. Dowdall* (1), that under a clause of that description no action at law could be maintained against the shareholders jointly, because the provision that each proprietor was only to be liable to the extent of his own share in the capital stock was inconsistent with the joint liability at law. One or two of the Judges in that case who were in the majority did throw out an opinion that

(1) 18 Q. B. 2.

possibly a separate action might have been maintained against each proprietor, but I think that, on carefully studying the case, it will appear that the majority of the Judges were not of that opinion. I am of opinion that a separate action at law could not have been maintained against each proprietor, and for this reason—If a separate action could be maintained against each, the proprietors to be sued would have been not the persons who were proprietors at the time when the death occurred and the policy became payable, but the persons who were proprietors at the time when the policies were effected. Nothing can be clearer than the clause respecting the transfer of shares. It is said in the plainest terms that when the transfer is effected, the transferring person is to be absolutely released and discharged from all liability, and yet if they were liable separately the transfer would be no answer in a Court of Law, and he would be liable to be sued.

I am of opinion, therefore, that no action could be maintained, and if that is so the only remedy is in equity. Now what was the remedy in equity? It must be remembered that at that time no Winding-up Act had passed, and there was no Joint Stock Companies Acts and no other Act relating to this society, and, beyond all question, a Court of Equity could not have interfered with the assets which, according to the terms of the deed, had been transferred to the *European Society*.

Then it is said that the creditors could have reached the unpaid shares of the proprietors. But how could they have done so? They themselves could not have made calls on these proprietors. Before the passing of the Winding-up Acts and the Joint Stock Companies Acts, a Court of Equity had no power to make calls on the shareholders. All that it could have done would be to compel the directors to make calls, and the directors must have made them in accordance with the provisions of the deed of settlement. And it will be found that the only mode in which the calls could be made would be by bringing an action at law on his covenant against each proprietor who executed the deed, or each proprietor who had taken a transfer on the covenant that he would perform the duties of a proprietor. In the deed of settlement every person party to the deed covenants with five trustees, and these five trustees covenant with other persons to observe all the terms of

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C. A. the deed. There is also a provision that every transferee of a
1875 share is to execute a covenant that he will perform all the duties
GRAIN'S CASE. of a proprietor. That being so, all that a Court of Equity could
— do would be to order actions to be brought on those covenants.
Then the question arises, whether an action could be maintained
against each of these proprietors years after the dissolution, and
years after all the affairs of the society had been wound up.
That question could be raised only between the persons who had
been shareholders and the covenantees who were bringing that
action, and it appears to me, from the terms of the 173rd clause
of the deed, that such an action could not have been maintained.
It contains an express provision that, notwithstanding the dissolu-
tion, they are to transfer to the other company such policies or
liabilities as they please; but they may keep other policies or
liabilities, and not wind up immediately; and then it goes on to
say that there shall be power for the general meetings and for the
Courts to call for and enforce payment of further instalments
until all claims shall have been respectively satisfied and provided
for. I think there cannot be a doubt that "satisfied" means until
those claims which have become payable have been paid, and
that "provided for" means until those claims which are to be pro-
vided for by getting another company to covenant have been thus
provided for. Until all that has taken place calls may be made
to assist the winding-up, but it is plainly implied that when the
winding-up is over, and when the surplus, supposing there is one,
has been divided among the shareholders for the time being, no
further calls are to be made. It is absurd to suppose that after
the affairs of the company are wound up, and after the shareholders
who do not choose to come into the new company have received
their shares of the assets after the winding-up, and the company
is dissolved, any further call should be made.

I am, therefore, of opinion that, according to the true construc-
tion of the deed, treating it as a strict matter of law, there would
be an answer to an action on the covenant, and that there would
have been no breach of covenant in refusing to pay up an instal-
ment, even supposing that any directors could be found to make
a call. It seems to me that a Court of Equity would have had
no means of compelling the proprietors to pay. That being so,

the subsequent Act enabling calls to be made by the Court cannot make people liable who would not have been liable if no such Act had been passed.

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LORD CAIRNS, L.C.:—

The costs will be provided for out of such funds as the arbitrators shall direct, as in the other cases.

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LORD CAIRNS, L.C.:—

The observations which have been made in reference to *Hort's Case* will really cover *Grain's Case*, which, up to a certain point, is exactly the same as *Hort's Case*. There is this peculiarity, that Colonel *Grain*, having occasion to go on service to the *West Indies* after the *European Society* had taken the business of the *Royal Naval Society*, made an arrangement with the *European Society* by which, for a higher premium, he received permission to go to the destination for which he was setting out. If what we have said in *Hort's Case* did not cover *Grain's Case*, it might have become necessary to consider what the effect of that special contract made with the *European* would have been. It is unnecessary, however, to consider that question, because what we have said in *Hort's Case* will cover *Grain's Case*, and shews that he also can rank as a creditor only against the *European Society*. His costs, as well as the costs of all parties, will be provided for by the arbitrator.

Solicitors for the official liquidator: *Mercer & Mercer*.

Solicitor for Mr. *Hort*: *T. Donnithorne*.

Solicitors for Colonel *Grain*: *Wood, Street, & Hayter*.

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Nov. 3.

In re EUROPEAN ASSURANCE SOCIETY.

HARMAN'S CASE.

Companies—Amalgamation—Powers of Company—Policy-holder—Vote.

By the constitution of the *A.* life insurance company, the policy-holders had votes at the meetings of the company, and shared in the profits; power was also given to the company, under resolutions made at meetings of the company, to amalgamate with any other company. Under resolutions duly made, the property and liabilities of the *A.* company were by a deed, in which the property and liabilities were specified, transferred to the *B.* insurance company:—

Held (on a question stated by the Arbitrator under the *European Assurance Society Arbitration Act, 1875*), that a policy-holder in the *A.* company whose policy was specified in the deed of transfer, had no claim on the *A.* company.

AN insurance company, called the *Anglo-Australian and Universal Family Life Assurance Company*, was formed and was registered in 1853. By the deed of settlement it was provided that the policy-holders should be summoned to and attend the meetings of the company, having votes in proportion to the amounts of their policies; it was further provided that the profits of the company should be divided between the shareholders and the policy-holders in certain proportions. By the 17th clause of the deed it was provided that an extraordinary meeting of the company should have full power to make resolutions by a majority consisting of at least two-thirds in value of the shareholders present (either personally or by proxy), also of two-thirds in value of the policy-holders of the company personally present at such meeting, to make and enter into and carry out any contract for the undertaking or performance of all or any part of the assurances and engagements of other assurance companies, whether incorporated or not, and also to resolve upon the purchase of the business of any other company, or upon the taking of any other company whether by way of amalgamation or otherwise, or upon the sale of its own business, or upon the amalgamation of the company with any other company; and every or any such resolution was thereby made binding and conclusive upon

the company, provided that it should have been previously recommended and confirmed as therein mentioned.

Under a policy dated the 29th of February, 1856, *George Harman* insured his life with the *Anglo-Australian Company* for £200.

In April and May, 1858, at extraordinary meetings of the shareholders and policy-holders held for the purpose, resolutions were duly passed for an amalgamation of the company with another company called the *British Provident Fire and Life Assurance Society* upon the terms contained in a deed afterwards made and dated the 1st of June, 1858.

By that deed, after reciting the holding of the meetings, it was witnessed that the two companies agreed that as from the 19th day of April, 1858, the *Anglo-Australian Company* and its business should be transferred to and united and amalgamated with the *British Provident Society* upon the following terms:—First, that the business and property, effects, liabilities, and engagements of the *Anglo-Australian Company*, as set out in the schedules to the deed, including the risks and engagements of the life assurance and endowment policies, and also the policies and grants of annuities issued by and then in force of the *Anglo-Australian Company*, should be and were thereby absolutely transferred to and should be undertaken by the *British Provident Society*; nor should it be necessary to the establishing by the holders thereof of their claim (if any) payable thereunder, that such policies or grants of the *Anglo-Australian Company* should be indorsed by or on behalf of the *British Provident Society*, or that new policies or grants should be issued in lieu thereof unless the holders thereof should require the same, in which case it was declared that the holders of policies or grants of annuities should determine which, or either, or if both of the methods therein described for the transfer to or assumption by the *British Provident Society* of the policies or grants of annuities of the *Anglo-Australian Company* should be made or effectuated.

The deed contained many other clauses, one of which provided for the dissolution of the *Anglo-Australian Company*, and another provided that, except as to the matters by the deed affected, nothing should be done to injure the legal constitution of the *Anglo-Australian Company*, which, until otherwise determined by

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a meeting of the *British Provident Society*, should, for the purpose of continuing the benefits connected therewith, be fully maintained and continued.

In the schedule of policies annexed to the deed *Harman's* policy was specified.

By subsequent deeds the assets of the *Anglo-Australian Company* were duly transferred to the *British Provident Society*, and the *British Provident Society* purported to guarantee the *Anglo-Australian Company*.

Mr. *Harman* afterwards made some communication to the *British Provident Society*, in answer to which a deed of guarantee by the *British Provident Society* was sent to him.

The *British Provident Society* was afterwards amalgamated with or transferred to the *British Nation Life Assurance Society*, and that society was amalgamated with or transferred to the *European Assurance Society*.

The affairs of all these companies came within the *European Assurance Society Arbitration Act*, 1872 (35 & 36 Vict. c. cxlv.), and Mr. *Harman* made a claim before the Arbitrator in respect of his policy against the *Anglo-Australian Company*. His case came before Lord *Westbury* as Arbitrator under the Act, and Lord *Westbury*, following other cases decided by him, held that Mr. *Harman* had not, by paying premiums to the *British Provident Society* and the *European Society*, accepted either of those companies in the place of the *Anglo-Australian Company*, which remained liable to him.

The case was afterwards re-heard before Lord *Romilly* as Arbitrator, who reversed the decision of Lord *Westbury*, and held that Mr. *Harman* had accepted the liability of the *British Provident Society* in the place of the *Anglo-Australian Company*, and therefore had no claim against that company.

The case then came before Mr. *Reilly*, the Arbitrator appointed under the *European Assurance Society Act*, 1875 (38 & 39 Vict. c. clvii.), who, under the powers of that Act, stated the following question for the opinion of the Court of Appeal in Chancery:—

Whether the decision of Lord *Romilly*, reversing the previous decision of Lord *Westbury*, ought not itself to be reversed or altered,

and the decision of Lord *Westbury* upheld, or upheld with variations; and whether any and which of the above contentions on the part of the joint official liquidator and the said *George Harman* respectively ought finally to prevail.

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Jackson, Q.C., and *Millar*, for Mr. *Harman* :—

The question now raised as to the effect of the 17th clause of the deed of settlement was not raised before either of the Arbitrators, and the evidence on the subject is therefore scanty. The previous transactions cannot have any effect, and the deed between the companies is the only thing at which we can look. Probably the clause in the deed of settlement providing for an amalgamation would prevent any policy-holder from obtaining an injunction, but would not take away the rights of the policy-holders as against the company. The deed may make the *British Provident Society* liable, and may leave the *Anglo-Australian* shareholders also liable. The arrangement was that one company was to be primarily liable, but that is all. In no case has a company been allowed in this way to transfer all its liabilities, and no such transaction can affect the policy-holder except so far as it may give him a claim against a second company. This is not a mutual assurance company, though the policy-holders might participate in the profits. There is a distinct provision for keeping the *Anglo-Australian Company* in existence, and that shews that what was done was not an amalgamation, but a mere transfer of assets and of right to receive the premiums. The deed itself contemplates the issue of fresh policies. The policy-holders are creditors, and cannot be affected by these dealings between the companies: *In re India and London Life Assurance Company* (1).

The deed of settlement seems to provide for a sale only, and it will be a very strong measure to construe this clause in the deed of settlement as letting off some one with whom I have contracted, and substituting some one with whom I have not contracted. There is nothing to release the *Anglo-Australian* shareholders, and they are only to be indemnified by the *British Provident Society*.

(1) Law-Rep. 7 Ch. 651.

C. A. *Higgins*, Q.C., and *Romer*, for the official liquidator, were not called upon.

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LORD CAIRNS, L.C. —

In this case the *Anglo-Australian Company*, in which Mr. *Harman* was originally assured, was formed under a deed which, to a certain extent, is peculiar in its provisions. There were shareholders in the *Anglo-Australian Company*, but the policy-holders had a voice in the conduct of the affairs of the company; they had votes at the general meetings; they were to be summoned to attend the general meetings; and their votes were to be in proportion to the amount of their policies, so many votes for a certain sum of money, and in that proportion they ranked with the shareholders in the management of the company. The policy-holders also were entitled to a certain proportion of the profits of the company.

In the 17th clause of the deed power was given to deal with other companies, by way of either buying the business of other companies, or of selling the business of the *Anglo-Australian Company* to another company, or of amalgamating with other companies, and that power was to be exercised with the consent of the policy-holders at extraordinary meetings called for the purpose, and by a majority consisting of at least two-thirds in value of the shareholders present personally or by proxy, and of two-thirds in value of the policy-holders present at these meetings.

That being the constitution of the *Anglo-Australian Company*, in which Mr. *Harman* was insured, and the policy-holders having that degree of control over the action of the company, what took place was this. Extraordinary meetings were held, and it was resolved to transfer all the assets to a company called the *British Provident Society*, to make all the shareholders in the *Anglo-Australian Company* shareholders in the *British Provident Society*, and to agree with the *British Provident Society* that the *British Provident Society* should take over the engagements of the *Anglo-Australian Company*.

Now this agreement was, as I have said, come to at extraordinary meetings of the policy-holders and shareholders, duly convened for the purpose, according to the 17th clause of the

deed of settlement. All was rightly and properly done. The policy-holders, therefore, according to the constitution of the company in which they were insured, had a voice in the arrangement, whatever it was, which was being made with the *British Provident Society*. Mr. *Harman*, whose case is before us, as I have already said, either agreed with what was done, or was in a minority, and in that case, there being a proper majority, he was bound by what the majority did. What was done is evidenced by the deed of amalgamation, as it is called, of the 1st of June, 1858. [His Lordship then stated the contents of the deed.]

Now to this agreement Mr. *Harman* was a party, and his policy is among those enumerated in the schedule. Therefore, incorporating the schedule with the agreement, it amounts to this, that there is an agreement to which in substance Mr. *Harman* is a party, or at all events by which he is bound, that the particular policy issued to him by the *Anglo-Australian Company* is transferred to and is and shall be undertaken by the *British Provident Society*, and that it shall not be necessary for his safety that it should be indorsed, or that a new policy should be granted, but that he may have it indorsed or have a new policy granted, if he is so minded.

I think it cannot admit of any reasonable doubt that, if you read the provision as to this particular specific policy into the general words of the deed, this is an agreement to which no meaning can be given, unless it means that the burthen which up to that time lay upon the shoulders of the *Anglo-Australian Company* is shifted from them, and placed for the future entirely and solely upon the *British Provident Society*, and in this arrangement Mr. *Harman* is a concurring party.

It is, perhaps, not necessary to add, but I may add, that in the state of things before us, any other agreement would have been simply absurd. It would have been absurd and incredible to suppose that the shareholders in the *Anglo-Australian Company* were to be transferred to and become shareholders in the *British Provident Society*, with all these transferred liabilities taken over, and yet that they were at the same time to remain liable for exactly the same amount of money in the old company, and that the old company was to continue for the purpose of enforcing any

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such liability. A provision is indeed found inserted at the end of the deed, that it is to continue a company, but that is only for the benefit of the *British Provident Society*, namely, for the purpose of realizing the assets which were to be transferred to the *British Provident Society*.

That is the whole of the case so far as regards the arrangement, which arrangement was complete, because although the formal deed of transfer of the assets was not made till a later date, everything was finished when the deed of the 1st of June was executed. It appears that at a later period Mr. *Harman* made some communication to the *British Provident Society*, and the *British Provident Society* in answer to that communication—the nature of the communication we do not know—forwarded to Mr. *Harman* a deed by the *British Provident Society* which upon the face of it appears to be a deed guaranteeing—it uses that expression—his policy. It appears to me to be quite unnecessary to construe that deed more minutely. If the deed means that it placed the *British Provident Society* as guarantors, in the legal sense of the term, of a liability, which was to be the liability of the *Anglo-Australian Company*, then that is a proceeding by the *British Provident Society* which was entirely *inter alios*, and can have no effect on the *Anglo-Australian Company* or their rights or position. They were strangers to what was done; it is not evidence against them, or binding upon them in any way whatever. It appears to me what was done was done in a careless and thoughtless manner, but can have no effect upon the rights of the *Anglo-Australian Company*.

Both parties have agreed, with regard to any further questions as between the *British Provident*, the *British Nation*, and the *European Societies*, it being the opinion of the Lords Justices that there is no liability of the *Anglo-Australian Company*, that they shall be decided by the Arbitrator in the arbitration. In my opinion, without using the term “novation,” all liability of the *Anglo-Australian Company* under this policy ceased, and came to an end upon the execution of the deed of the 1st of June, 1858.

JAMES, L.J.:—

I am entirely of the same opinion.

MELLISH, L.J. :—

I am of the same opinion. I think the case is rendered perfectly clear by the provision which makes the policy-holders practically part of the company, and makes their assent a necessary part of the amalgamation. It is quite unnecessary to say whether, even if there was another deed with similar words not requiring the consent of the policy-holders, or of the shareholders without the policy-holders, but simply using the word sale, or amalgamation, such a provision would be sufficient to enable the shareholders to get rid of their liability. In this case it is quite unnecessary to consider that question, because I am convinced that the intention of all parties was that there should be a power to amalgamate with another company, or to sell the business to another company, and that the shareholders separately, and the policy-holders separately, should be able to determine whether it was the interest respectively of the policy-holders and of the shareholders that such sale or amalgamation should take place.

THE LORD CHANCELLOR :—As to the costs of this appeal, the Act contemplates the necessity of bringing this matter by way of appeal before us, and therefore the costs must be provided for by the Arbitrator out of such funds as he thinks fit.

Solicitor for *Harman* : *Gover*.

Solicitors for Official Liquidator : *Mercer & Mercer*.

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C. A. *In re* EUROPEAN ASSURANCE SOCIETY ARBITRATION
 1875 ACTS AND WELLINGTON REVERSIONARY ANNUITY
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 Nov. 25. AND LIFE ASSURANCE SOCIETY.

CONQUEST'S CASE.

*Novation—Assurance Society—Policy-holder.*

*3rd D. 8*

Mrs. C., while a single woman, insured her life with the *W. Society*. The *W. Society*, without authority, assigned over its business to the *B. N. Society*. A circular was sent to the policy-holders stating that the proprietors of the *W. Society* had agreed with the *B. N. Society* to unite the business of the two companies; that the terms and conditions of the policies of the *W. Society* would remain unaltered; that premiums should be paid to the manager of the *B. N. Society*, but that policy-holders who had paid premiums through an agent might continue to pay them through the same agent; that the policy-holders were guaranteed by the *B. N. Society* for all claims under their policies, but that if they chose they could have their policies indorsed, or new policies granted by the *B. N. Society*. Mrs. C. at this time was married. After this the *B. N. Society* made over its business to the *E. Society*. Mrs. C. never had her policy indorsed or any new policy granted, and she went on paying her premiums through the same local agent as before. Receipts were given her headed at first "*B. N. Society*, with which is united the business of the *W. Society*," afterwards "*B. N. Society* in union with the *E. Society*," and ultimately "*E. Society*" simply:—

*Held*, that no communication had been made to Mrs. C. calculated to convey to her that she was to pay her premium with any different result, or on any different contract from that on which she had theretofore paid it, and that she could not be taken to have intended to adopt the liability of another society in lieu of that of the *W. Society*.

*Semble*, inasmuch as the case was one of a contract for a reversionary payment to a married woman, such an adoption could not have been effectually made.

THIS was an appeal from a decision of Lord *Westbury*, as arbitrator under the *European Society Arbitration Act*, 1872, to the effect that Mr. and Mrs. *Conquest* were entitled to rank as creditors against the *Wellington Reversionary Life and Assurance Society* under a policy of life assurance.

The *Wellington Society* was constituted under a deed of settlement dated the 25th of July, 1853. Mrs. *Conquest* (then Mrs. *Clare*, widow) insured her life with the society on the 22nd of May, 1861, for £300 with profits, the bonuses to be appropriated so as to make the policy payable during the life of the assured. One of the con-

ditions in the policy was that no receipts for premiums should be admissible in proof of payment except receipts signed by two of the directors of the society. Another society, the *British Nation Association*, was formed under a deed of settlement dated the 28th of February, 1855, which gave it powers to acquire the business of other companies, but the deed of settlement of the *Wellington Society* did not contain any power of making over its business to another company. In 1863, negotiations were set on foot for a transfer of the business of the *Wellington Society* to the *British Nation Life Assurance Association*, and an arrangement was come to for the latter to take over both the assets and the liabilities of the former. Upon the completion of the transfer the directors of the *Wellington Society* sent to their policy-holders a circular, dated the 31st of July, 1863, of which the material parts were as follows:—

“The proprietors of this society have decided to accept an offer made by another association to unite the business of the two companies . . . This union, which takes effect from midnight of 15 June last, has been made with the *British Nation Life Assurance Association*, of 316, *Regent Street*, where for the future the business will be carried on. The terms and conditions contained in the policies issued by this society will remain unaltered by this arrangement. The policy-holders are fully guaranteed for all claims under their present policies by the *British Nation*, by the agreement between the two companies, but any of the assured desiring it, can have the indorsement to that effect made on their policies, or can receive new policies from the *British Nation*. All communications should henceforth be addressed, and all premiums paid to the receipt of *Henry Lake, Esq.*, manager of the *British Nation Life Assurance Association*, 316, *Regent Street, London*. Should you, however, have been accustomed to pay your renewal premiums through an agent, you will still be enabled to do so, as arrangements will be made to empower the existing agents of the *Wellington* to act for the *British Nation Company* . . . . The great advantages of uniting assurance companies are now being thoroughly recognised and appreciated by the public. They may be summed up briefly thus. The union of companies increases business, income, security, and bonus, and decreases expenditure,

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competition, and the liability to fluctuation. The business of two companies can be conducted in one office, and by one staff without material addition, and the whole of the saving goes to improve the prospects of a large bonus.

“The *Wellington* policy-holders will have not only the security of the large annual income of the joint business, but it has been arranged that in all future bonuses they shall participate on an equality with all the other policy-holders in the conjoint companies. They will thus secure not only the benefits to which they were entitled in this company, but the additional benefits to be derived from the accumulation of interest and power.”

This circular was accompanied by one signed by the manager of the *British Nation*, the material parts of which were as follows:—

“It is announced to you by the accompanying letter from the *Wellington Life Insurance Society*, that an arrangement has been concluded for the union of the business of that society with this association. Under the agreement made between the *British Nation* and the *Wellington Society* it is not necessary for us to trouble policy-holders to send their policies for indorsement by this association. Should you, however, wish it, if you will forward your policy, either direct or through the agent in your district, it shall be immediately returned to you indorsed, signed by three directors, and sealed with the seal of this association: or, if you prefer it, a new policy of this company will be issued in lieu of the one you now hold. But it is necessary for me to inform you that all policy-holders are perfectly secure under the renewal receipts, and that the terms and conditions contained in the policies issued by the *Wellington Society* remain unaltered by this transfer. . . . Your position as a policy-holder, I need scarcely remark, will be greatly improved by the arrangements now made for the union of interests, and by the conduct of the joint business as one office and by one official staff a very considerable reduction of expenditure is effected, which must add considerably to the bonus . . .”

Before these circulars were received Mrs. *Conquest* had married her present husband. Her policy was not indorsed by the *British Nation*, nor was any new policy issued in lieu of it. She went on

paying her premiums through the same local agent at *Bedford* as before. The receipts given were in the following form :—

“*British Nation Life Assurance Association*, with which is united the business of the *Wellington Life Assurance Society*.

“Chief Offices, 316, *Regent Street, London*.

“Receipt No. . Policy No. 39,651. Sum assured, £300.

“Received this . day of ., the sum of £7 5s., being the payment of one year’s premium from . to ., for an assurance on the life of *Emma Conquest* effected by the before-named policy.

“*Henry Lake, Manager.*”

In 1865 the business of the *British Nation* was made over to the *European Society*. This transfer was effected by a deed dated the 16th of March, 1865, by which the *British Nation* made over to the *European Society* its goodwill, policies of assurance, and all premiums, profits, fines, and other moneys to become due in respect of those policies, and all stocks, funds, and securities of the *British Nation*; and the *European Society* took upon itself all the liabilities of the *British Nation*, and agreed to indemnify the *British Nation* against them. It did not appear that any circulars were sent to the policy-holders on this occasion. Mrs. *Conquest*, after this, went on paying her premiums in the same way as before. The first receipt given to her was headed “*British Nation Life Assurance Association* in union with the *European Assurance Society*,” and signed by Mr. *Lake* as manager. Most of the subsequent receipts were headed only “*European Assurance Society*,” and were signed by two directors.

In 1867 a bonus was declared by the *European Society*, and a special circular was prepared to be sent to the policy-holders in the *Wellington Society*, which was in part as follows :—

“I am instructed by the board of directors to announce to you that a valuation of the affairs of the society up to 31 December, 1865, has been completed, and that an allotment of reversionary bonus has been made. I have great pleasure in informing you that the amount assured under the above policy has at this division been made payable on the life assured obtaining the age of . years, unless the policy shall have previously become a

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 1875 the above policy can be added to the amount assured. Should I  
 CONQUEST'S not hear from you before 29th September next, I shall conclude  
 CASE. that you have adopted the first mode of application, namely, of  
 making the policy payable in the lifetime of the assured."

Owing to some mistake a circular in the above form was not sent to Mrs. *Conquest*, but she received one in the following form :—

"I am instructed by the board of directors to announce to you that a valuation of the affairs of this society up to 31 December, 1865, has been completed, and that an allotment of reversionary bonus to that period has been made. I have great pleasure in informing you that the reversionary sum added to the above policy at this division is £2 8s." Mrs. *Conquest* took no notice of this circular.

On the 12th of January, 1872, an order was made for winding up the *European Society*, and an order was subsequently made for winding up the *Wellington Society*. The question now was, whether Mr. and Mrs. *Conquest* were entitled to prove against the *Wellington Society*, or whether they had accepted the liability of the *British Nation Society* in substitution for that of the *Wellington Society*. Lord *Westbury*, as arbitrator, decided that there was a right of proof against the *Wellington Society*. The joint official liquidator appealed in pursuance of a certificate of the arbitrator.

*Higgins*, Q.C., and *Romer*, for the appeal :—

This is brought forward as a representative case to try the question whether there was a novation with the *British Nation*. Whether there is a right to prove against the *European* is a point not at present raised. We say that Mrs. *Conquest* was informed that she was going to be handed over to another society, and that she assented to being so handed over. Her policy informed her that she must have receipts signed by two directors of the *Wellington*. She comes here with receipts signed by two directors of the *European*.

[MELLISH, L.J.:—Can there be a novation of a contract for a reversionary payment to a married woman?]

It was assumed below that Mr. and Mrs. *Conquest* together stood in the same position as any absolute owner. The policy informs the policy-holder that the receipt of an agent will not be admitted.

[JAMES, L.J.:—That can only put the policy-holder to prove payment otherwise.]

That is not done here, and the payment to an agent not being allowed, it cannot be contended that the *European Society* were agents of the *Wellington*, and that their receipts are therefore good evidence of the payment of the premiums according to the policy.

*Jackson*, Q.C., and *Cust*, for Mr. and Mrs. *Conquest*, were not called upon.

LORD CAIRNS, L.C. :—

The material facts of this case are these :—Mrs. *Conquest* (at that time Mrs. *Clare*, widow) effected an insurance on her life with the *Wellington Society* in the year 1861 for £300, and she now claims along with her husband, to whom she was subsequently married, against the *Wellington Society* upon this policy, and she produces, as the proof of the payment of the premium, a receipt from the *European Society* signed by two directors of that society.

The first question which arises is how does that receipt shew, and does it shew at all, the payment of the premium which was due and payable under the policy issued by the *Wellington Society*. Now the facts of the case (I do not speak now of what was known to Mr. and Mrs. *Conquest*, but of what we know now to be the facts of the case) as to the relations between the *Wellington Society* and the *European Society* are these :—The *Wellington Society* entered into an agreement with the *British Nation Assurance Association* in the year 1863, which was in substance an agreement for a transfer to the *British Nation* of the business, the obligations, and the available property of the *Wellington*. The operation was evidenced by certain resolutions come to at a meeting of the *Wellington*, and by certain deeds which followed up those resolutions. For the present purpose it is sufficient to say that there was a transfer from the *Wellington* to the *British Nation* of the

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goodwill of the former company, of all the policies of insurance, and of all the premiums payable under those policies of insurance. So far, therefore, as matters stood between the *Wellington* and the *British Nation*, it would be right and proper that the premiums payable under the *Wellington* policy by Mrs. Conquest, or by Mr. and Mrs. Conquest, should be paid to the *British Nation Association*. The next circumstance which is material is that in the year 1865 the *British Nation Association* transferred its business and its obligations to the *European Society*. The deed is dated the 16th of March, 1865. Now this deed of amalgamation professes to be an assignment to the *European Society* of all the interest and goodwill of the *British Nation* in the life assurance business, and all the full benefit and advantage thereof, and all policies of insurance, and all premiums, profits, fines, and other moneys to become due in respect of those policies, and all stocks, funds, and securities of the association; and then it provides that the *European* should indemnify the *British Nation* in the ordinary way, and take over all its liabilities. Therefore, again turning to the position of things as between the *British Nation* and the *European*, it was right and proper as between those two companies that the premiums of the *Wellington*, which were to be paid to the *British Nation*, should now become payable to the *European*. Therefore, as between those three companies—the *Wellington*, the *British Nation*, and the *European*—the production by Mr. and Mrs. Conquest of the receipt signed by the *European* would be evidence of payment to the right quarter of the premium upon the old policy originally effected with the *Wellington*.

But now comes the question, *quo animo* was that payment made by Mr. and Mrs. Conquest to the *European*? It may have been made in one of two ways. It may have been made either as acting on that *catena* of representation which I have described, which passed on the right of receiving the premium, first to the *British Nation*, and then to the *European*, without any intention of altering the original contract made with the *Wellington*; or the payment of the premium to the *European* may have been made in pursuance of an assent by the policy-holder to a substitution, first of the *British Nation* for the *Wellington*, and secondly of the *European* for the *British Nation*.

Now in all these cases which are called—I will not stop to consider whether correctly or not—cases of novation, it has always appeared to me to be a question of fact in each particular case with what intent the payment of the premium to a different company, or into different hands from those mentioned in the original policy, was made, and whether it was made with the intent of accepting as responsible a body different from the company originally insuring.

Then turning to the facts of this case, in order to answer the question—*quo animo* was this payment made by Mr. and Mrs. *Conquest*? we must first discover what was the information which was conveyed to the mind of Mr. and Mrs. *Conquest* as to the transactions which had actually taken place between the *Wellington* and the *British Nation*. That depends entirely upon written documents. I will advert only to those parts of the circulars addressed to Mrs. *Conquest* which appear to me to be material. [His Lordship here read parts of the circulars of the 31st of July set out above.]

It appears that Mrs. *Conquest*, who at this time had been married the second time, was living at *Bedford*. She had before the receipt of the circular paid her premiums to one *Francis*, the local agent of the *Wellington*, and she continued after the receipt of the circular to pay her premiums to the same *Francis* and his successor in office. The circular which I have read provided that if any person had been in the habit of paying to an agent in the country, he might go on making the payment in that way, it being arranged that the country agents were to be agents for both companies.

Now we have not to consider here what would have been the case if a statement of this kind had been made to a policy-holder: “The company with which you have insured is about to cease to carry on business; it desires to get rid of all its obligations and to transfer them over to another company; an intimation is given to you that that is the arrangement between the two companies, and that in pursuance of that arrangement you are for the future invited to pay your premiums to the new company.” Whatever might be thought of an intimation of that kind, that is not the

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intimation here given. Nothing whatever is proposed to the policy-holder by way of choice, or is submitted for his election, but he is told that an arrangement has been made which was entirely *intra vires* the company which had insured him, viz., to join their business with the business of another company, so that the two businesses might be carried on together with the diminished expenditure of one office and one staff. And it is in order to act on that arrangement that the policy-holder is told as a matter of course, and as a direction which he must follow, that his premiums are to be paid for the future at the united office, or if to a country agent, then to a country agent who would represent both companies. There is nothing in that which, to my mind, conveys to the policy-holder any call for a choice or for an election—there is nothing that conveys to him that he is for the future to pay his premium with any different result or on any different contract from that on which he hitherto has paid it. To that must be added in this particular case the fact that the policy-holder to whom this notice was given was a married woman. Mrs. *Conquest* had originally effected the insurance, as I have said, when a widow; she was now under coverture, and I have, to say the least of it, very great doubt whether her husband was armed by the coverture with sufficient power to alter a contract which had secured to her at her death a reversionary payment, viz., the sum insured by the policy.

Now what more is there in the case? The *British Nation Association* at a later period, as I have said, did with regard to the *European* what the *Wellington* had done with regard to the *British Nation*. It does not appear that any circulars were sent at that time to the policy-holders in the *British Nation*; but, as I have said, we have now in the deed between the *British Nation* and the *European* the fact that the *European* were entitled to receive the premiums which hitherto had been paid to the *British Nation*. There is nothing, however, in the arrangement between the *British Nation* and the *European* which presented to Mr. and Mrs. *Conquest*, any more than the former arrangement had done, any call to elect a change of responsibility towards them on the policy. The receipts throughout are consistent with the facts that

I have stated ; those given by the *British Nation* are headed in this form :—

“ *British Nation Life Assurance Association*, with which is united the business of the *Wellington Life Assurance Society*.”

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and those given afterwards for some time were headed :—

“ *British Nation Life Assurance Association* in union with the *European Assurance Society*.”

Then it appears that the policy of Mrs. *Conquest* was a policy entitled to bonus, entitled to a participation in profits. A bonus in 1867 was declared by the *European*. A form of circular which would have been suitable to the particular policy of Mrs. *Conquest*, which was a policy on which profits were to be paid and applied so as to make the policy effective during the lifetime of the assured, was prepared, and ought to have been sent to Mrs. *Conquest*. This circular was not sent to her, but a circular was sent to her which, as applied to her policy, was erroneous. It stated that a valuation of the affairs of the society had been completed, and the allotment of reversionary bonuses to that period made. It stated that the writer had great pleasure in informing Mrs. *Conquest* that the reversionary sum added to her policy at this division was £2 8s., which was erroneous, because her bonus, if the terms of her policy had been pursued, would not have been added by way of reversionary increment to the policy, but secured and paid during her life. However, in point of fact, no notice was taken of this circular. No dealing with the bonus took place by Mr. and Mrs. *Conquest*, nor was any assent whatever given by them to the communication which had been made to them on behalf of the *European*. It appears to me, therefore, that the circular as to the bonus does not carry the case any further than it was carried by the facts which existed before that time. I therefore am of opinion, without any doubt, that there is nothing here whatever which, as between the *Wellington* and Mr. and Mrs. *Conquest*, released the *Wellington* from their obligation, that that obligation on the policy still continues, and that Mr. and Mrs. *Conquest* are entitled to rank as creditors on the policy against the *Wellington*.

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I am of the same opinion. I wish only to add this, that if Mrs. *Conquest* had remained throughout a single woman, and the case had not been added to by the fact of her marriage, it appears to me that the same result must have arisen. Mr. *Higgins* admitted that in this case on the contract itself the *Wellington Company* was liable, and that therefore, if the condition of the contract were fulfilled by the payment of the premiums, the *Wellington Company* must be liable, unless by some subsequent act or conduct there has been a substitution of another office for the original office. The burthen of proof with respect to that is entirely on the liquidators of the *Wellington*, who, it appears to me, have given nothing that amounts even to a shadow of proof of any such bargain by Mr. *Conquest*, on behalf of himself and his wife, as would effect such substitution.

MELLISH, L.J. :—

I am of the same opinion. I do not wish to give, and it is not necessary to give, any conclusive opinion as to the effect of the marriage. Putting that aside, I entirely agree that this is a question of fact. There is no deed by which the *Wellington Company* could transfer their policy-holders as in some of the other cases arising under this arbitration, neither is there any contract in writing by Mrs. *Conquest* or Mr. and Mrs. *Conquest* which could raise as a question of law the point whether she had agreed to take the *British Nation* in lieu of the *Wellington*. The only evidence in proof of the alleged agreement by Mr. and Mrs. *Conquest* to that effect consists in their having sent no answer, either to the circulars that were issued at the time when the change took place or to the circular respecting the bonus, and in their having paid the premiums, first to the *British Nation*, and afterwards to the *European*. Now, I would not go so far as to say, that if this had been tried in a Court of Common Law, slight though that evidence would be, there would not be evidence to be left to a jury. But the question for the jury would be whether Mr. and Mrs. *Conquest* had, *ex animo*, intended to take, and agreed to take,

the liability of the *British Nation* in lieu of the liability of the *Wellington*, and I do not believe that a jury would be found in all *England* who on this evidence would turn round in the box for the purpose of considering whether they had agreed to any such substitution.

There has always appeared to me to be a great difficulty in making one case of this class a precise precedent for another; for when we are considering whether, *ex animo*, a party has assented to a thing, the position of the person himself becomes material. One policy-holder may have been for years a director of insurance companies, and may understand all about novation, and may, from a circular which is sent, know perfectly well that what he is asked is whether he will assent to take the other company or not; and then even his not answering, or his going and paying the premiums, may be sufficient to fix him. On the other hand, the policy-holder, as is very often the case, may not be a man of business, or a lawyer, but a lady, who has insured her life on her marriage, or a clergyman, or an officer in Her Majesty's service, who knows nothing at all about business; and in such a case a jury would say to the old company, "It was the business of your directors, if they wished to free you from liability, to tell the policy-holder in plain terms, such as he could understand, that he had the choice whether he would adopt the new company or remain with the old company. You should have told him plainly that if he meant to adopt the new company, he was to pay his premiums in such a way and at such a place; and that if he wanted to keep the liability of the old company, he was to pay his premiums in such another way and at such another place." I do not mean to say that it is essential that the directions should be thus explicit. I quite agree that, in whatever way the circular may be worded, if it is such as to convey the information to the mind of the policy-holder that he is to choose, and then knowing that he has the choice, and that his choice is to be expressed by payment of his premiums in a particular way, he goes and pays them in that way, there would be enough to fix him. But if directors issue a perfectly ambiguous circular, such as this, from which ordinary people would not understand in the least that they were altering their position at all, you cannot say that there is a novation by the policy-

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holders, who have done nothing more than pay their premiums at the only place where they were told to pay them. What were they to do? They could not allow their policies to drop, and it is idle to say that they might have applied to the Court of Chancery. These small policy-holders cannot be expected to take such a course as that. The question is really a question of fact, and I have no hesitation in coming to the conclusion that there is not sufficient evidence to justify the inference that Mr. and Mrs. *Conquest* intended to adopt the liability of the *British Nation Association* in lieu of the *Wellington Society*.

Solicitors: *Mercer & Mercer ; Stimson.*

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# OLIVANT v. WRIGHT.

[1873 O. 18.]

*Will—Construction—Tenant for Life—"Die without Issue"—Period of Division.*

6 Ch D 606  
608. 9.  
5 App Cas 129  
19 Ch D 472

A testatrix devised and bequeathed her separate estate to her husband for life, and after his death to be divided amongst her five children, and if any of her children should die without issue, that then that child's share should be divided among the children then living; but if any child should die leaving issue, that issue should take its parent's share. The five children of the testatrix all survived the tenant for life:—

*Held* (reversing the decision of *Bacon*, V.C.), that the estate was, at the death of the tenant for life, to be divided between the five children absolutely.

*O'Mahoney v. Burdett* (1) and *Ingram v. Soutten* (2) distinguished.

*ANN*, wife of *James Nicholson*, being possessed of separate estate, real and personal, made her will, dated the 29th of November, 1844, containing the words following:—

"I give and bequeath unto my husband, *James Nicholson*, all my real and personal property, whether houses, land, or whatever else I am entitled to from my late aunt's estate, and all other effects belonging to me, wheresoever they may be at the time of my decease, during his natural life to receive all the rents,

(1) Law Rep. 7 H. L. 388.

(2) Law Rep. 7 H. L. 408.

interest, and profits arising from them, for his own use ; and after his decease to be divided amongst my five children, share and share alike ; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living ; but if any of my children should die leaving issue, then that child (if only one) should take its parent's share, and if more than one, to be divided equally amongst them, share and share alike."

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The testatrix died on the 31st of August, 1846, leaving her husband and the five children her surviving.

Her husband, the tenant for life, died in March, 1857.

*Richard Nicholson*, one of the five children, died in August, 1874, having had one son, *James Nicholson*, who died in July, 1866. *Ann Parkinson*, another child, had died in 1868, leaving four children her surviving.

The Vice-Chancellor *Bacon*, in construing this will, had decided that the interests of the children of the testatrix, on their deaths leaving issue, went to their respective children living at their deaths ; and that the share of *Richard Nicholson* devolved upon the three surviving children, as reported (1).

*Sarah Nicholson*, widow of *Richard Nicholson*, and his devisee and general legatee, appealed.

*Swanston*, Q.C., and *A. T. Watson*, for the Appellant :—

We say that *Richard Nicholson*, as a child who survived the tenant for life, took a fifth absolutely. The question is whether the words "die without issue" and "die leaving issue" refer to death at any time, or to death before the period of division, and we say to death before the period of division. There are in this will expressions which prevent the cases of *O'Mahoney v. Burdett* (2) and *Ingram v. Soutten* (3) from applying.

[They also referred to *Treharne v. Layton* (4).]

*Hastings*, Q.C., and *Everitt*, for the children of Mrs. *Parkinson* :—

The construction contended for on the other side cannot be given without inserting, after the word "die," the words "in the

(1) Law Rep. 20 Eq. 220.

(3) Law Rep. 7 H. L. 408.

(2) Ibid. 7 H. L. 388.

(4) Ibid. 10 Q. B. 459.

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lifetime of *James Nicholson*." No doubt there is a direction to divide, but that is not conclusive, or else many of the cases on similar words would not have arisen: *Gosling v. Townshend* (1); *Bowers v. Bowers* (2).

*Ince*, Q.C., and *North*, for other parties.

JAMES, L.J. :—

The Vice-Chancellor has, it appears to me, laid down accurately the rule that where there is a gift over in the event of death without issue, that direction must be held to mean death without issue at any time, unless a contrary intention appears in the will; and that the introduction of a previous life estate does not alter that principle of construction. That rule was so laid down by the House of Lords in dealing with the case of *O'Mahoney v. Burdett* (3), and in dealing with the case of *Ingram v. Soutten* (4), where the Lord Justice and myself had thought that we ought to follow as a general rule the 4th canon of construction in the case of *Edwards v. Edwards* (5), and had laid down that the introduction of a previous life estate altered the *onus probandi*, and raised a presumption that the death referred to was to be considered as a death in the lifetime of the tenant for life, unless a contrary intention appeared in the will. But the House of Lords appears to be of opinion that the rule was, in *Edwards v. Edwards*, laid down in terms too general, and that a gift over in the event of death without issue was to be construed in the same way, whether there was a tenancy for life or not.

In every case these rules must be governed by the qualification which the Vice-Chancellor has introduced in this case, that is to say, unless a contrary intention appears in the will. Now, applying that qualification to this particular will, it seems to me, with all deference to the Vice-Chancellor, that a contrary intention does appear almost in express words. [His Lordship then read the will.] What is the meaning of the words "and after his decease"? Can there be any doubt that "after his

(1) 17 Beav. 245.

(3) Law Rep. 7 H. L. 388.

(2) Law Rep. 5 Ch. 244.

(4) Ibid. 408.

(5) 15 Beav. 357.

decease" means the time when the estate for life comes to an end, and when the property is to be divided? I do not think it material to consider whether this is real or personal estate; but a consideration does arise that this is a gift of both real and personal estate, which must be absolutely divided between the children; and the will goes on further to say how the division is to be in the event of there not being five children then living to receive their shares. The will says "if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living." The natural meaning of the word "then" would be the time of the division, which was before spoken of as to be made at the death of the tenant for life; and according to the plain and natural meaning of the words, this can only mean that immediately after his decease the executors and the trustees are to see that her property is actually divided among her five children. In my opinion there is throughout this will only one period of division contemplated.

The whole scheme of the will seems to be as plain and reasonable as any scheme of a will can be. There is to be a division at the death of the tenant for life, and every event which can occur at the death of the tenant for life has been provided for. All is consistent with the intention that there is then to be a final division. Any other construction would lead to so many absurdities and contradictions, that I cannot bring myself to entertain any doubt whatever as to what the intention of the testatrix was. It is the duty of a court of construction to give effect to that which appears to the Court to be the plain intent of the words used.

I am, therefore, of opinion that the Vice-Chancellor did not make a correct application of the rule he himself laid down as applied to this particular will.

MELLISH, L.J.:—

I am of the same opinion. I think it is quite clear that by the word "divided" the testatrix meant that the executors were actually to divide the property, and that the *corpus* of the property, real and personal, was to be actually handed over and given to the children or their issue, as the case might be. That seems to me

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to be made quite clear by the difference in the description as to how the property is to be enjoyed during the lifetime of the tenant for life, and how it is to be enjoyed afterwards. The tenant for life is only to receive the rents, interest, and profits, and is not to have the *corpus*; but after his decease it is to be divided among the five children. If when the executors come to the division they find one of the children is dead, and is dead without leaving issue, they are to divide his share among the other children who are then alive, but if any of the children have died leaving issue, then that issue will take the parent's share. All appears to me to point to one period of division, whereas, according to the argument on the other side, there might be several periods of division; and what is to happen if all the five children, one after the other, die without leaving issue, does not exactly appear.

Following the rule of the House of Lords, it does appear clearly in this case, that there are contrary intentions expressed in the will, which shew that "dying without leaving issue" was not intended to refer to the time of death of the person who dies, but the time of death of the tenant for life.

BRAMWELL, B. :—

I am of the same opinion. I have only this additional observation to make, that if the construction put upon the will by the Respondent is right, the consequence follows, which, as I understand it, the Vice-Chancellor held did follow, that the surviving children take the shares of the child dying without issue, to the exclusion of the issue of the child who died with issue, which certainly is unreasonable. Another consequence which follows, as I understand, is that a child may die leaving issue, living the tenant for life, and though that issue may die, living the tenant for life, he is still entitled to the share, which also seems unreasonable. That is to say, a grandchild dying during the life of the tenant for life would take that which a child dying during the life of the tenant for life would not take.

BRETT, J. :—

I am of the same opinion. I agree that the Vice-Chancellor has laid down a proper rule, but has misapplied that rule to this

will. The question here is, whether there is a contrary intention apparent on the face of the will. Now, it seems to me that there is an express direction to divide at a particular time—the death of the tenant for life—not restricted or modified by any other express stipulation or intimation of a contrary intention. Here it is obvious, upon consideration of the absurdity of what would happen under any other construction, that the meaning of the words “after his decease” is “at the time of the decease.” It appears to me that the general rule does not prevail, as a contrary intention appears on the face of the will; and the construction of the Vice-Chancellor on this will is therefore wrong.

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MINUTES:—Declare that the order of the Vice-Chancellor be varied by making a declaration that under the will of *Ann Nicholson*, *Richard Nicholson*, as surviving *James Nicholson*, took an absolute interest in one fifth share of the estate devised and bequeathed by the will of *Ann Nicholson*, and that *Sarah Nicholson*, as representing him, is entitled thereto. Costs of the appeal by arrangement to be costs in the cause.

Solicitors: *Miller & Wiggins; Johnston.*

### SAWYER v. GOODWIN.

[1861 S. 204.]

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Nov. 19.

*Solicitor's Liability—Improper Investment—Payment out of Solicitor's Estate—Right of Solicitor to Benefit of Security—Right of subsequent Incumbrancers.*

A solicitor invested the money of one of his clients without his knowledge on an improper mortgage security. The client, believing the security to be insufficient, proved against the estate of a partner of the solicitor, which was being administered in Chancery, for the whole amount of the debt, and, under a compromise, received a dividend out of the estate. Afterwards it turned out that the security was sufficient to pay the client in full.

*Held* (reversing the decision of *Hall*, V.C.), that the dividend must be repaid to the solicitor's estate, and did not enure for the benefit of the subsequent incumbrancers on the mortgaged property.

THIS was an appeal from an order of Vice-Chancellor *Hall* made in Chambers.

Messrs. *Charles Goodwin, Frederick Robert Partridge, John*

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—

*Charles Williams*, and *Henry Edwards*, for some time carried on the profession of solicitors in partnership, at *King's Lynn*, in *Norfolk*.

*Charles Goodwin* died in December, 1859, and the Defendants in the present suit were his executors. On his death the partnership was dissolved, and *Partridge* carried on business with *Edwards* alone.

In the month of September, 1861, *Williams* absconded to avoid his creditors, and it was then discovered that he had, during the continuance of the old partnership, fraudulently misapplied large sums of money belonging to the clients. *Williams* had concealed these misapplications from his partners, but their estates were nevertheless held to be accountable for the loss occasioned thereby.

In October, 1861, *Partridge* and *Edwards* were adjudicated bankrupts, and in January following they obtained their discharge.

The present suit was instituted by the creditors for the administration of the estate of *Goodwin*.

Another suit, *Brett v. Goodwin*, was also instituted for the administration of the joint estate of the partnership.

*Williams* had advanced various sums of money belonging to the clients of the firm on the security of the freehold estate of Colonel *J. L. Vaughan Watkins*, and among other sums £8000 belonging to Messrs. *Patteson* and *Penyston*, the executors of *J. A. Partridge*, deceased. There were altogether eight mortgages on the estate, of which *Patteson* and *Penyston's* was the fourth. *Patteson* and *Penyston*, believing that the estate would not be sufficient to pay their mortgage debt as well as those prior to it, proved for the whole debt of £8000 against the estate of *C. Goodwin*, and against the joint estate of the partnership.

On the 10th of July, 1868, an order was made in the suit of *Sawyer v. Goodwin* that a compromise which had been agreed to between the executors and the creditors should be carried into effect. By this order it was ordered that *Patteson* and *Penyston*, and also the subsequent mortgagees of Colonel *Watkins*, should receive 5s. in the pound on the respective amounts of their debts, interest, and costs; that the other creditors of the estate should

be paid, some in full, and some at other proportionate rates; and that the residue of the assets, not exceeding £6000, should be paid to the executors of *C. Goodwin*; but that if the residue of the assets should exceed the sum of £6000, then that £6000 should be paid to the executors, and the surplus divided between the executors and the various creditors proportionally to their original shares: and it was also ordered that, on such payment and distribution being made, the estate of *C. Goodwin* should be relieved from all liability to the creditors; provided that such payments should not relieve or discharge any other person or persons, or the estate or estates of any firm, or any of the respective members thereof, other than *C. Goodwin*, from any liability to pay the said debts, or any part thereof.

*Patteson* and *Penyston*, and also the subsequent mortgagees, consented to the compromise, and *Patteson* and *Penyston* received £2199 3s. 10d. under the order. It was then ascertained that the estate of Colonel *Watkins* was sufficient to pay *Patteson* and *Penyston* the whole of the debt, interest, and costs in full, and to leave a small residue towards payment of the subsequent mortgagees, but not sufficient to pay them in full. The question, therefore, arose whether the sum of £2199 3s. 10d. ought to be paid back to *Goodwin's* estate for distribution among the other creditors, or to be retained by *Patteson* and *Penyston* in part satisfaction of their mortgage debt—so as to relieve the mortgaged estate for the benefit of the subsequent mortgagees. A summons was accordingly taken out by the executors for an order upon *Patteson* and *Penyston* to repay to them the amount of the dividends received by them. The Vice-Chancellor expressed an opinion that the dividends ought to be retained by *Patteson* and *Penyston*, and applied in part satisfaction of their mortgage debt. He, therefore, made no order except as to costs. His Honour declined to adjourn the summons into Court, but gave a certificate to enable the parties to appeal.

The executors accordingly appealed from this order.

*W. Pearson*, Q.C., and *F. J. Wood*, for the Appellants:—

Messrs. *Patteson* and *Penyston*, having been overpaid, ought to repay the dividend they have received from the testator's estate

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to the executors, that it may be applied for the benefit of the other creditors according to the compromise.

The executors were only under an obligation to indemnify the testator's clients against loss by the investment, and if the clients are paid *aliunde*, the executors are entitled to stand in their place, and have the benefit of the security as against the subsequent mortgagees and the mortgagor. The subsequent mortgagees have no equity to the benefit of any money coming to a prior mortgagee from another source; their bargain was to be paid out of the estate, and they must look to that alone. If the order of the Vice-Chancellor is correct in principle, it would follow that the mortgagor might ultimately get the benefit of the dividends out of the testator's estate.

*Fischer*, Q.C., and *Baker*, for the Plaintiffs, and

*Dickinson*, Q.C., and *W. W. Karlake*, for devisees of real estate, supported the same view.

*Karlake*, Q.C., and *Romer*, for other creditors.

*Southgate*, Q.C., *Eddis*, Q.C., and *Cracknall*, for *Patteson* and *Penyston*:—

We are no longer personally interested, having been paid in full: but we appear to support the interests of the subsequent incumbrancers. A prior mortgagee who receives money from any source in respect of his mortgage debt, must bring it into account for the benefit of those subsequent to himself. The subsequent mortgagees took their security with the chance of the prior mortgages being paid off without having recourse to the estate. If they had been paid by the mortgagor himself, there would have been no question, and it can make no difference if it is paid by some stranger to the estate. But, independently of the general principle, we rely on the terms of the compromise. Here were a great many contested and doubtful claims, all of which were confirmed; and all parties agreed to accept a dividend calculated according to their supposed interests, on the express condition that they were to make no further claim upon *Goodwin's* estate. If this is re-

paid to the estate it will be in violation of the compromise and the principle on which it was based.

*Field*, for the Plaintiffs, in the suit of *Brett v. Goodwin*.

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JAMES, L.J.:

It is much to be regretted that a matter so important, and involving so considerable a question of equity, has not been brought before the Court of Appeal in such a way as to give us the advantage of knowing the grounds on which the Judge in the Court below based his opinion. It is not the function of the Court of Appeal to have questions argued before them in the first instance. Not having the advantage of hearing the reasons on which the Vice-Chancellor proceeded, we feel ourselves obliged to come to a different conclusion. I am of opinion that the Appellants' contention is quite right. The case must be considered, first, independently of the compromise, and, secondly, in connection with the compromise, which two points have been somewhat mixed up in the argument. First, then, independently of the compromise, the facts are these: certain moneys were invested by a solicitor without authority, on the security of a freehold estate. This mortgage was considered to be insufficient, and a claim in respect of it was taken in by them against the estate of *Goodwin*, the solicitor's partner, and the claim was admitted to the full amount of the debt, the security being still held by the mortgagees, who retained their rights over the estate to their fullest extent; at the same time they had a right to be reimbursed out of *Goodwin's* estate everything which they might lose through the insufficiency of the security. However, as between *Goodwin's* estate, the mortgaged property, and the mortgagees, the mortgaged property was the first fund liable to the debt to be first realized, and bear the burden so far as it would extend. At that time the mortgaged property was thought to be insufficient, and *Goodwin's* estate paid 5s. in the pound on the debt; and then the mortgaged property pays the whole of the debt, so that the mortgagees have received the whole amount of their debt, with interest and costs, and also a dividend from *Goodwin's* estate. Under these circumstances, I am of opinion that an equity arises between the mortgagees and *Good-*

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*win's* estate that they should return the dividend to *Goodwin's* estate. Then it is said that the mortgagees were parties to a compromise; but there was no arrangement that this compromise should in any manner enure for the benefit of the subsequent mortgagees. I am, therefore, of opinion that the money ought to be repaid to *Goodwin's* estate for the benefit of the general creditors, and that the compromise makes no difference.

MELLISH, L.J. :—

I am of the same opinion. There is no doubt about the general rule of equity that if a client entrusts money to a solicitor for the purpose of investment of a particular kind, and he invests it in an unauthorized security, he is bound to repay it just as if it still remained in his hands uninvested; and if he replaces it he is entitled to the benefit of the supposed rotten security.

Does it make any difference if the solicitor, instead of paying the debt in full, pays only a portion? Clearly none. If he becomes bankrupt and only pays 5s. in the pound, his trustee would have the same equity to have the dividend returned if the security proves sufficient.

So in this case, if there had been no compromise, and the Court had distributed *Goodwin's* estate in the usual way, the executors would have the same claim.

Then it is said that there has been a compromise. I cannot see that that makes any difference. The compromise was expressly made without prejudice to the securities. The whole of *Goodwin's* estate was to be distributed, but in all other respects the rights of the parties were the same as if there had been no compromise. If the mortgaged estate had been realized before the dividend had been paid, and had proved sufficient, it is impossible to say that the mortgagees would still have received the dividend under the compromise for the benefit of the subsequent incumbrances. It can make no difference which estate is realised first. I am, therefore, of opinion that the money must be repaid to *Goodwin's* executors as part of his general estate.

BAGGALLAY, J.A. :—

I have arrived at the same conclusion. What was the state of

things when the solicitor had advanced the money on the fourth mortgage? The effect of the transaction was that the clients had the right to treat the money as still in the hands of the solicitor, but at the same time to have the benefit of the mortgage security until they were repaid. If the debt had been paid by the solicitor, that payment would not have enured to the benefit of the mortgagor or of any of the subsequent incumbrancers, but the solicitor would have been entitled to the security. When the suit was instituted for administering *Goodwin's* estate there was no notion that the debt would be paid out of the mortgaged estate, and it was admitted as a debt in the administration suit to the full extent. Supposing it had been then paid by the mortgagor or out of the mortgaged estate, there can be no doubt that any dividends previously received from *Goodwin's* estate would have had to be repaid to his executors as part of the estate. Then what was the effect of the compromise? There is nothing in the terms of it to alter the rights of the parties; it merely fixed the amount of dividends at 5s. in the pound, and we come back to the equity that the dividends ought to be paid back to the estate out of which they came.

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BRETT, J.:—

I am of the same opinion. I have a great disinclination to give judgment on such a point as this, but I have been sent here in order that we may come to some common mode of judgment. I must, therefore, give my opinion, although I do it with hesitation. It seems to me that as between the Appellants and the Respondents, whether the money is claimed by the Appellants alone or on behalf of the subsequent incumbrancers also, this is clear, namely, that those persons who have mortgages on *Watkins'* estate have two claims, one against the mortgaged estate and another against *Goodwin's* estate. They are two distinct claims. If this class of creditors could not have realized anything from the mortgaged estate, they would have been on the same footing as the other creditors; and they would, like the other creditors, have received 5s. in the pound. Afterwards the mortgaged estate produced the entire sum due to them, and they were entitled to receive it in full from the mortgaged property. It is



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clear that they cannot keep both sums, and they must repay the dividend. If there had been no compromise, to whom must they have repaid it? I should have thought it clear that they must have repaid it to those who had paid it to them, that is, to the representatives of *Goodwin's* estate.

The counsel for the Respondents say that a prior mortgagee must account to subsequent mortgagees for all money received in respect of his mortgage debt. But that can only be true of what is received from the mortgaged property or from the mortgagor. Here the money sought to be recovered back was not received from either, but from the solicitor's estate.

Then, as to the compromise, it was said that the creditors all made an arrangement to take a lump sum and to release *Goodwin's* estate, and that the estate is to have no benefit which may arise from any security. But if every creditor has agreed to take a lump sum, the Respondents have agreed to take it, and the money must remain in the present hands; that cannot be the intention of the compromise. The true view, as it seems to me, is that something that was paid away has unexpectedly come back to the estate, and must be divided among all the creditors not already paid.

Solicitors: *Poole & Hughes; Brettell, Smythe, & Brettell; Sismey; Greenfield; Field, Roscoe, & Co.*

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*Bankruptcy Act, 1869, s. 6, sub-s. 6—Adjudication—Debtor's Summons—Several Debts—Payment of One—Tender.*

Two creditors whose debts together amount to more than £50, though each debt is less, can issue a debtor's summons on which the debtor can be adjudicated bankrupt.

A tender of the amount of his debt to one of the creditors in such a case does not prevent the adjudication.

*J. H. ANDREW*, a debtor, in the early part of the year 1875, filed a petition for liquidation by composition. A composition of 15s. in the pound was duly accepted by his creditors, payable

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by six equal instalments, the payment of the two first instalments being secured by an assignment of his equity of redemption in a freehold mill and machinery. The first instalment was paid, but default was made in payment of the second instalment, whereupon, on the 20th of July, 1875, a debtor's summons was issued against him for payment of the sum of £60 9s. 3d., made up of £26 12s. 9d. due to one *Rolt*, and £33 16s. 6d. to one *Goodwin*. Within seven days afterwards *Andrew* took the amount of *Rolt's* debt to his counting-house. The clerk there refused to receive it, and *Andrew* left the money on a table, whence it was put by the clerk in a drawer, where it still remained.

A petition for adjudication was then presented by *Rolt* and *Goodwin*, on which the Registrar held that the payment to *Rolt* had been good as a payment or tender, but amounted only to payment of part of the debt, as the debts could not be severed. The debtor was thereupon adjudicated bankrupt.

The debtor appealed.

*R. V. Williams*, in support of the appeal:—

We say, in the first place, that two creditors whose debts together exceed £50, though each separate debt is less than £50, cannot combine and issue a valid summons under the *Bankruptcy Act*, 1869, s. 6, sub-s. 6. The words are very like those in the old Acts, under which it was held that two creditors could not combine. If creditors could combine, why was any sum named as that to which the debt must amount? In *Ex parte Kibble* (1) the debts of some of the creditors did exceed £50.

But besides this, we have paid, or at all events made a valid tender to one of the creditors, and then there remains only one creditor with a debt less than £50. One creditor cannot say that he will not receive his debt without the consent of the other: *Ex parte Rowan* (2).

*De Gex*, Q.C., and *E. C. Willis*, for the petitioning creditor:—

The Forms 4 and 10 in the Schedule to the *Bankruptcy Rules*, 1870, shew clearly that several creditors may join.

JAMES, L.J.:—No doubt the Forms were made part of the Rules, but in my opinion several of them were issued *per incuriam*.

(1) Law Rep. 10 Ch. 373.

(2) Law Rep. 9 Ch. 617.

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*R. V. Williams*, in reply :—

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Where the summons is irregular it will be dismissed : *Ex parte Wier* (1) ; *In re Hodges* (2).

JAMES, L.J.:—

For the purpose of our decision we will assume that there was a good tender, or that there would have been a good tender but for the fact of two creditors having joined in the debtor's summons.

Though I adhere to the opinion I expressed in *Ex parte Kibble* (3), that there is great inconvenience in two or more creditors joining in a debtor's summons, on account of the difficulty in dealing with them, still it appeared to the Lord Justice and to myself that it is not possible to read the Act and the General Rules and the Forms without seeing that it was intended that two or more creditors each for a debt less than £50, but with debts in the aggregate exceeding £50, should be able to take out a debtor's summons on which to make a trader bankrupt. The Forms no doubt contemplate several creditors joining in a debtor's summons, and the words of sect. 6, sub-sect. 6 of the Act seem also to be clear, reading words in the singular as in the plural and words in the plural as in the singular where necessary for the meaning of the Act. If the act of bankruptcy be not paying the sum due, that is not prevented by making a tender of one of the debts which the creditor has refused to accept. The tender has not destroyed the debt, so that the creditors may aver truly that those are the amounts of debt due to them, and the Court would not prevent the creditors from proceeding, unless the debtor is willing to pay both of the debts.

No difficulty can arise, because if the debtor has tendered once he must be ready to tender again if necessary ; but can it be supposed that, in case of a tender on the day of adjudication, the Court would compel one creditor to accept payment for the purpose of destroying the rights of the other ?

The decision of the Registrar was, in my opinion, quite right, and this appeal must be dismissed with costs.

(1) Law Rep. 6 Ch. 875.

(2) Law Rep. 8 Ch. 204.

(3) Law Rep. 10 Ch. 373.

BAGGALLAY, J.A. :—

I am of the same opinion.

It appears to me that, upon the true construction of the Act, two or more creditors can join in issuing a debtor's summons. If there is any doubt upon the construction of the Act, that doubt appears to me to have been removed by the Forms issued by the Lord Chancellor under the 78th section, which makes them of the same force as if they were included in the Act.

As to the other point, even assuming a valid tender to have been made, I doubt if in such a case payment to one of two creditors would be sufficient to deprive the other of the rights given to him by the Act.

BRAMWELL, B. :—

I am entirely of the same opinion.

Mr. *Williams* made two points on the alleged tender of payment of one of the debts. He said that as the debtor had made that tender, or attempt at tender, it could not be alleged that he had neglected to pay "such sum" or such sums because he had tendered or attempted to tender one of them. The answer is, that the meaning of the section is, "if he shall have neglected to pay such sum or sums." He has not paid them, or attempted to do so, but has attempted to pay only one of them.

The other point was, that this tender or attempt prevented the existence of a debt of £50 at the date of the petition on which adjudication ought to take place. To this there are two answers: First, that there was no sufficient tender. The alleged tender was made to one who swears that he had no authority to receive the money, who did not receive it for his employer, but to prevent its being lost took charge of it for the debtor. The other answer is, that the two creditors are in the same condition as one creditor with two debts, and that when a creditor or two creditors have issued their summons, the debtor cannot, by a tender of one of the debts, deprive him or them of the rights given to them by the statute.

Solicitors: *Ingle, Cooper, & Holmes; F. Heritage.*

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Dec. 1, 2.

## WIMBLEDON AND PUTNEY COMMONS CONSERVATORS v. DIXON.

[1875 W. 90.]

*Right of Way—Road for all Purposes—Change in the Use of Dominant Tenement.*

3CLD. 8157  
818, 8237  
5CLD. 13576  
140.  
13CLD. 802  
5CLD. 250

The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm:—

*Held* (affirming the decision of *Jessel, M.R.*), that that did not establish a right of way for carting the materials required for building a number of new houses on the land.

*Semble*, the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate.

THIS was an appeal by the Defendant from a decree of the Master of the Rolls granting a perpetual injunction.

By the *Wimbledon and Putney Commons Act*, 1871, the fee simple of *Wimbledon Common*, including the roads hereinafter mentioned, became vested in the Plaintiffs. Up to that time, it had been vested in Earl *Spencer*, as lord of the manors of *Wimbledon* and *Battersea* and *Wandsworth*, or one of them.

Adjoining the south side of the common was an ancient earthwork known as *Cæsar's Camp*, inclosing about fifteen acres. On the eastern side of *Cæsar's Camp* were three messuages built in or soon after the year 1867, and adjoining the south side of the common. Access to these houses was obtained from the east by a road called the *New Road*, which ran westwardly over the common near its southern boundary, from a public road called *Workhouse Lane*, and by two short roads running southwards out of the *New Road* to the entrance gates of the messuages, these short roads

being nearly at right angles to the *New Road*. The most westerly of these two cross-roads was at the western end of the *New Road*, and at a distance of about sixty yards from *Cæsar's Camp*.

*Cæsar's Camp*, the sites of the above three messuages, and the farm and lands on the southerly and westerly sides of them, known as *Warren Farm*, *Shadwell Wood*, and *Warren Cottage*, were the property of Mr. *Drax*, and *Cæsar's Camp* formed part of the farm. Before 1867, access for horses and carriages to these lands was obtained by an old private road running from *Workhouse Lane* to a cottage, called *Camp Cottage*, adjoining the north-east corner of the most easterly of the above three messuages, and by several old tracks over the common, leading from the end of the road near *Camp Cottage*, to a gate which formed the eastern entrance to *Cæsar's Camp*. This user was admitted to have been immemorial.

In 1867 Mr. *Drax* let to the Defendant the site of the three above-mentioned messuages. The Defendant negotiated with Earl *Spencer* for a right of way to them. No grant of a right of way was ever made, but Earl *Spencer* made the *New Road* and the two cross-roads at his own expense, making a complete road up to the most westerly of the cross-roads. There was some conflict of testimony as to whether the *New Road* was carried completely to the gate of the camp, but the result appeared to be that a finished road was made up to the cross-road, and that from that point to the gate little was done, but that something like a road existed. It appeared that up to *Camp Cottage* the *New Road* was nearly identical with the old private road mentioned above. Until the passing of the Act the Defendant paid Earl *Spencer* £10 a year for the use of the roads.

In 1872 the Defendant became tenant to Mr. *Drax* of part of *Cæsar's Camp* and some adjoining land, and made preparations for building a house within the camp. The Plaintiffs thereupon gave him notice that they recognised no right of access to the camp over *Wimbledon Common*, except along the existing road or track to the gate of the camp for the purposes of agricultural occupation only. The Defendant replied, asserting his right to use the roads for access to any houses he might build, but did not proceed any further till 1875, when he commenced building operations. The Plaintiffs

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thereupon filed their bill, praying that the Defendant might be restrained from drawing along the *New Road* leading from *Workhouse Lane* to the entrance to *Cæsar's Camp*, or any part of it, any building materials for the erection of houses or other buildings on *Cæsar's Camp*, or on any part of *Warren Farm*, and from otherwise using the *New Road* as a means of access to the camp and lands in excess of the user to which it was liable as a road made in substitution for the ancient tracks across the common.

It was not disputed by the Plaintiffs that the occupier of *Warren Farm* and the other lands mentioned above had from time immemorial enjoyed the right of using the way for all ordinary agricultural purposes connected with the farm and adjoining land. *Cæsar's Camp* was much resorted to by visitors, who, when they wished to enter it in a carriage, used to send for the key of the gate, which was kept on the farm, the gate usually being locked. The Defendant, however, claimed a right of way for all purposes, and in proof of the road having been used by the occupiers of the farm for all purposes, he adduced evidence to the following effect: That about thirty years ago, when a wing was added to the farmhouse and a new stable built, the materials were carted along the road through the gate into *Cæsar's Camp* and thence to the farm; that about the year 1855 buildings were being erected on *Wimbledon Hill*, and that for several weeks large quantities of sand and gravel were dug out of the ground which afterwards was the site of the above-mentioned three messuages, and carted along the road past *Camp Cottage* and through the gate into the camp and thence to *Wimbledon Hill*; and that about the year 1859 *Warren Cottage* was altered from a clay tenement into a brick-built cottage, and the materials carted to it by the same way; and that the road was used by persons having the right of shooting on the farm. There was also some evidence as to another cottage having been built on the farm and the materials brought along the new road.

The Master of the Rolls granted a perpetual injunction restraining the Defendant from drawing, or causing to be drawn, along the *New Road* leading from *Workhouse Lane* to or towards the entrance to *Cæsar's Camp*, or along any part of the said *New Road*, any bricks, stone, or other building materials to be used in the

erection of houses or other buildings, other than ordinary farm buildings, upon *Cæsar's Camp*, or any part thereof, or upon any of the lands then or then lately forming part of the *Warren Farm*, and in which the Defendant claimed to be entitled under his agreement with Mr. *Drax*, except for the ordinary farming purposes of the said camp and lands respectively; and from otherwise using the said *New Road* as a means of access to the said camp and lands in excess of the user to which it was liable as a road made in substitution for ancient tracks across *Wimbledon Common*. The Defendant appealed.

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*Miller*, Q.C., and *Bush*, for the Appellant:—

The injury to the Plaintiffs is too slight to make a case for an injunction.

[MELLISH, L.J.:—But must we not determine whether you have the right you claim?]

We have enjoyed a right of way from time immemorial, and it has been used for all purposes for which we had occasion to use it. A right of way for all purposes across a common may be established by slighter evidence than across a private field. *Cowling v. Higginson* (1) and *Dare v. Heathcote* (2) shew that a user for all purposes for which the owner has required to use the land, shews a general right of way for all purposes. The case of *United Land Company v. Great Eastern Railway Company* (3) supports our case. The quantum of inconvenience is the test: *Gale on Easements* (4); and to the owner of a common there is no sensible inconvenience in a right of way for all purposes. The grant, therefore, which is presumed from immemorial user is to be supposed a general one. The *Wimbledon Common Act* (34 & 35 Vict. c. cciv.) s. 107, helps us, the words being “enjoyed and used” without saying “entitled.”

[MELLISH, L.J.:—That is only a saving clause.

BRAMWELL, B.:—You wish to turn “shall not prejudicially affect” into “shall beneficially affect.”]

(1) 4 M. & W. 245.

(2) 25 L. J. (Ex.) 245.

(3) Law Rep. 10 Ch. 586.

(4) Ed. 1868, p. 330.



C. A. *Chitty, Q.C., and W. R. Fisher, for the Plaintiffs:—*

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We admit a right of way for farm purposes, and that we have never disputed. The onus lies on the Defendant to shew that he is entitled to anything more.

[MELLISH, L.J.:—The case you have to meet is that the road has been used for every purpose for which the owners of the dominant tenement wanted it, which *Parke, B.*, in *Cowling v. Higginson* (1), appears to consider sufficient evidence of a general right of way.]

*Williams v. James* (2) lays down the rule applicable to the case. User is evidence only of a right to use the way for all purposes reasonably incident to the property as it stood, not to the property when artificially altered into something quite different. *Cowling v. Higginson* was cited in that case. In *Allan v. Gomme* (3) the rule seems to have been laid down somewhat too strictly as to the dominant tenement remaining exactly in the same condition, and probably *Parke, B.*, only meant to object to this. In that case (4) *Jackson v. Stacey* (5) was cited with approbation. *Skull v. Glenister* (6) affirms the same rule.

[JAMES, L.J., referred to *Henning v. Burnet* (7).]

A reasonable amount of variation in the use of the dominant tenement is allowed, but the burden must not be substantially increased: *Baxendale v. McMurray* (8). In *Dare v. Heathcote* (9) it might well be found that changing the farm from an ordinary farm to a cattle farm was only a reasonable change of the use of the property in its existing state.

*Miller*, in reply.

JAMES, L.J.:—

I am of opinion that, subject to a slight alteration in the words of the injunction, the order of the Master of the Rolls ought to be affirmed.

(1) 4 M. & W. 245.

(2) Law Rep. 2 C. P. 577.

(3) 11 A. & E. 759.

(4) Page 771.

(5) Holt, N. P. 455.

(6) 16 C. B. (N.S.) 81.

(7) 8 Ex. 187, 194.

(8) Law Rep. 2 Ch. 790.

(9) 25 L. J. (Ex.) 245.

The question between the parties is whether Mr. *Dixon* is entitled to convert a piece of land forming part of an estate or farm called *Warren Farm*, and hitherto uncultivated, into sites for several houses, and to use, for the purpose of bringing materials for their erection, and for all purposes connected with the houses when built, a right of way which the owners and occupiers of the farm have from time immemorial enjoyed over land of the Plaintiffs. The right which Mr. *Dixon* claims under his landlord, Mr. *Drax*, is an unlimited right of way for all purposes over the Plaintiffs' land to and from every portion of the land constituting the *Warren Farm*, after the whole of the farm has been laid out for building purposes and turned into a town, if he should be minded and able so to convert it. As far as we have any evidence before us, the farm in respect of which this right is claimed has been substantially in its present state from time immemorial, during which it is to be assumed that the right of way has been exercised, that is to say, there were a farmhouse, farm lands, and a piece of woodland. The only alterations of which we have any evidence in the state of the property, have been an enlargement of the farmhouse to a small extent, the change of a mud cottage into a brick cottage, and probably the erection of another cottage—whether an erection or change I am not quite sure. But those are the only changes which are alleged to have taken place in the property. Now, that those changes may be material, and may be to some extent evidence of such a general right as is claimed, it is probably difficult to deny; but whether they amount to evidence sufficient to justify the inference of fact that such a right existed, is another question. I am of opinion that the mere fact that over a common some building materials were taken for the purposes I have mentioned, is not sufficient to justify the inference of fact that the right of way belonging to the house and property was to be an unlimited right of going to and from the land for all purposes, to whatever purposes the land might be applied. The way has also been used for ordinary agricultural purposes—for sporting, which seems to me the same thing as an agricultural purpose, and for taking gravel from a gravel pit in one of the fields. That is insufficient, as it seems to me, to enable us to draw the inference of fact that the extended right claimed by Mr. *Dixon* ever existed.

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The evidence practically comes to this, that the right of way has been exercised for all purposes connected with the use of the farm for residential or agricultural purposes.

We have then to consider whether the character of the property can be so changed as substantially to increase or alter the burden upon the servient tenement. I said when this case was first opened, that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. The *dicta* and observations, which are entitled to very great weight, of Lord *Abinger* and Mr. Baron *Parke* in the cases which have been referred to, inclined me at first to think that the opinion I had formed was wrong. But when we consider those remarks in connection with the very clear language of the Court of Queen's Bench in *Allan v. Gomme* (1), and of the Lord Chief Justice *Bovill* and Mr. Justice *Willes*, in the case of *Williams v. James* (2), I am satisfied that the true principle is the principle laid down in these cases, that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, *quâ* field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built. I therefore think that the Master of the Rolls was right in the result at which he arrived.

But I think it right to say, as the judgment of the Master of the Rolls has been read to us, that I am unable to agree with the view which apparently he formed, that there could be no right of way at all in respect of what are called the tracks over the common. I am not at all prepared to assent to that as a true statement of the law of this country. If from one terminus to another, say from the gate here to the end of a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track and sometimes by another, I am not prepared to say that a right of road across the common

(1) 11 A. &amp; E. 759.

(2) Law Rep. 2 C. P. 577.

from one terminus to the other may not be validly claimed, and may not be as good as a right over any formed road, but I fully concur in all that the Master of the Rolls has said as to there being no right to use the way further than for all purposes according to the ordinary and reasonable use of the land in the state in which it formerly was. It probably, however, would be better that the words in the order, "except for the ordinary farming purposes of the said camp and lands respectively," should be altered into some such expression as "except for the purposes to which the land has been heretofore applied."

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MELLISH, L.J.:—

I am of the same opinion. The question is whether Mr. *Drax* and his tenants are entitled to use this right of way for the purpose of turning the land into building land, for erecting new buildings upon it, and then, after the buildings are erected, for the purposes of those buildings. It is admitted in the bill, and proved in point of fact, that the right of way did exist for some purposes, and I do not, any more than the Lord Justice, agree with what was thrown out by the Master of the Rolls as to the consequence of the track not being a perfectly definite track over the common, but being a track going in varying lines previously to the time when the new road was made. No doubt if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to adjoin it, sometimes in one place and sometimes in another, and then went over the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus *a quo* and the terminus *ad quem*, the mere fact that the owner does not go precisely in the same track for the purpose of going from one place to the other, would not enable the owner of the servient tenement to dispute the right of road. Suppose the owner of this common had granted by deed to Mr. *Dixon* the right to go from the gate leading out of *Cæsar's Camp* to the highway by the National School with carriages and horses at his free will and pleasure, I cannot suppose that the grant would fail in point of law, because it did not point out the precise definite track between the one terminus and the



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other in which he was to go in using the right of way. If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough, and there are ruts in it, and so forth. In my opinion the bill has properly admitted that the Defendant has a right of way for some purposes.

Then comes the question, what is the extent of that right of way? That depends partly on a question of law and partly on a question of fact, but mainly on a question of law. When the question of law is settled there is no great difficulty in arriving at a proper conclusion in point of fact. The question of law is this: Assuming that it is made out that Mr. *Drax* and his tenants have used this way, not exclusively for agricultural purposes, but for all purposes for which they wanted it, in the state in which the land was at the time of the supposed grant—at the time when the way first began—and assuming that there has been no material alteration in the premises since that time, does that entitle Mr. *Drax* to alter substantially and increase the burden on the servient tenement by building any number of houses he pleases on this property and giving to the persons who inhabit those houses a right to use the way for all purposes connected with the houses. I certainly was under the impression when this case was opened that the owner of the dominant tenement could not increase or alter the burden on the servient tenement in any such way as that. Mr. *Miller* called our attention very pointedly to the language of Mr. Baron *Parke* in *Cowling v. Higginson* (1), which certainly raised some doubt in my mind as to what the true rule of law is. But now that the other cases have been cited, I doubt whether Baron *Parke* had the question now before us present to his mind, and I am of opinion that the true rule is that laid down by Lord Chief Justice *Bovill* and Mr. Justice *Willes* in the case of *Williams v. James* (2), and substantially assented to by Baron *Parke* himself in the case of *Henning v. Burnett* (3). In *Cowling v. Higginson* (4)

(1) 4 M. & W. 245.

(2) Law Rep. 2 C. P. 577.

(3) 8 Ex. 187.

(4) 4 M. & W. 245, 256.

Lord *Abinger* is cautious in the way in which he lays down the rule. He says (1): "If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shews a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed." If he has used it only for purposes connected with the occupation of the land in its existing state, that may be considered to be a user for particular purposes, and I have a doubt whether Baron *Parke* really intended the contrary, for if the facts in *Cowling v. Higginson* are looked at it will be found that the mines had been opened, and therefore, though they had not been worked for seventy years, it was a property with existing mines in it. The way, it is true, had not been used for those mines, but as the property was a property within which there were opened mines, it might fairly be inferred that the right extended to using the road for the purposes of the mines, the working them being a reasonable use of the land in the condition in which it was. But however that may be, in my opinion the true rule is that stated by Lord Chief Justice *Bovill*, that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Mr. Justice *Willes* evidently agrees with that view.

That being the rule, what are the purposes for which, according to the ordinary and reasonable uses to which this land might be applied, according to its state at the time of the grant or supposed grant, this road may be used. When *Warren Farm* was first inclosed we do not know, but at whatever time it may have been inclosed, one cannot suppose that anybody thought of its being used for general building purposes, though no doubt the owner of the farm must always have required, first of all, the way to the *Kingston Road* in one direction, and then a way to *Wimbledon*, which lies in another direction. Is there any such evidence of user for purposes beyond what was necessary, and beyond what was reasonably required for the occupation of the land in its existing state, as that

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we can find that the right extends beyond that? I agree, if we found that several houses had been built from time to time, and that the owner had carried the materials over this road, and the occupiers of the new houses had used the road, we might infer that the right of way was not to be confined to those particular houses, because that was not the original grant, but that the parties contemplated building generally at the time of the original grant, and intended to include in it a right of way to all future houses. I will not say that there is no evidence here of such a right, but there is not sufficient evidence for us to act upon, or to lead us to say that there is a right beyond what is necessary and reasonable for the occupation of the premises as a farm. The enlargement of *Warren Farm-house* does not carry the right beyond a right for farming purposes. It would be a very narrow construction to say that where a small farm-house with some small buildings was erected 200 or 300 years ago the right of way to it did not include a right of carting materials to enlarge the farm buildings so as to adapt them to the present state of agriculture.

Then with regard to the changing a mud cottage into a brick cottage. That is very weak evidence, if it is evidence at all; because if a mud cottage becomes unfit for human habitation, and is rebuilt with brick, although there is the carrying of bricks for the time, the burden is not permanently increased, for going to the brick cottage after it is once built is no greater burden than the going to the mud cottage. The other users that occurred of taking away gravel, of going there for the purposes of shooting, are users reasonably connected with the occupation of the premises, as they have been during the whole time that the right of way has existed, as far as we know. I am therefore of opinion that it is not made out that there is any right to use this road for the purpose of erecting entirely new buildings, and then, after those buildings are erected, to use the road for the purpose of those buildings. I agree, therefore, that the appeal must be dismissed.

BAGGALLAY, J.A.:—

I am of the same opinion. It appears to me that there are two

questions for decision in this case. First, what is the extent of the right of way which is proved by the evidence in the case, and, secondly, if a right of way is established limited to particular purposes, whether it can be extended consistently with the rules of law applicable to questions of the like kind. I think the judgment of Mr. Baron *Parke* in the case of *Cowling v. Higginson* (1) has been interpreted so as to extend its application beyond what that learned Baron intended. It is true that in one part of the judgment he uses this expression: "If it is shewn that the Defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to shew that they had a general right to use it for all purposes, and from which a jury might infer a general right." Those words taken by themselves point in the direction of Mr. *Miller's* argument; but I think those wide words are qualified by this further statement: "If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all." Now let us take the case of an agricultural district where there had been a right of way to certain land exercised for agricultural purposes only for a length of time, and then it appears that there is valuable gravel on the estate, and the gravel is raised and sold from time to time, and carried over the way previously used for agricultural purposes alone; if afterwards other mineral produce is found and raised, and the way is used for carrying that away, and then the way is used for a variety of other purposes that from time to time arise in the course of the occupation of the land, I can understand that if the case went to a jury, with user for all this variety of purposes established, the jury would or might infer that the original grant was a grant for all purposes. No such case arises here. If it is not proved by evidence—as I think it is—it is admitted that the right of way was used for agricultural purposes from time immemorial. In addition to that, two or three users are suggested as going beyond agricultural purposes, but do not appear to me to do so, such as building a new barn, adding a wing to the house, and the shooting. Then we have two slight circumstances—the replacing a mud cottage upon a portion of

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the property by a more substantial building, and the taking gravel and carting it away. We have no evidence of user for any purposes beyond the purposes I have referred to. If the case came before me as a jurymen to say whether I would infer a right to use the way for all purposes, I should answer "No." It is not like a general user for all purposes, such as Baron *Parke* contemplated. Therefore the first question must be answered that the right of way extended to the purposes for which it has hitherto been enjoyed, and no further.

Then the second question is, whether the right to use this way being limited to the particular purposes, as to which there has been actual proof, can be extended to the purposes for which the Defendant desires to use it. I think he cannot do that consistently with the rules of law which have been from time to time enunciated, and particularly in the case of *Williams v. James* (1), that you must neither increase the burden on the servient tenement, nor substantially change the nature of the user. Answering the questions that arise in this case in the way I have suggested, it appears to me that the judgment of the Master of the Rolls is correct; and, subject to the modification which has been mentioned by the Lord Justice, there must be an injunction.

BRAMWELL, B.:—

I agree. I have nothing to add.

Solicitors: *Horne & Hunter; Ward & Letchworth.*

(1) Law Rep. 2 C. P. 577.

*In re* DANIEL'S SETTLEMENT TRUSTS.

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Dec. 9.

*Construction—Settlement—Limitation to Children—Omission supplied.*

By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees in trust for the wife for life, and after her decease upon trust for all and every the child and children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, *his or her* executors and administrators. There followed a clause directing that the trustees should, during the minority of each of the said children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of every such child for or towards *his or her* maintenance and education until *his or her* share should become vested, or *he or she* should previously die:—

*Held* (reversing the decision of the Master of the Rolls), that daughters who attained twenty-one were entitled to share in the fund.

*Semble*, daughters would not acquire a vested interest till they attained twenty-one.

THIS was an appeal from a decision of the Master of the Rolls.

By a post-nuptial settlement dated the 25th of May, 1831, reciting that *Thomas Daniel*, for the purpose of making some further provision for *Anna Maria* his wife, and his children by her, was desirous and had agreed to assign and settle the several sums of stock thereafter mentioned, *Thomas Daniel* settled several sums of stock upon trust to pay the income to *Anna Maria Daniel* for life for her separate use, and after her decease “In trust for all and every the child and children of the said *T. Daniel* by the said *A. M.* his wife, begotten or to be begotten, who being a son or sons have or hath already attained or shall hereafter live to attain the age of twenty-one years, equally to be divided between or among them, share and share alike, as tenants in common, and their respective executors and administrators; and if there shall be but one such child, the whole shall be in trust for such one or only child, and *his or her* executors and administrators; and upon further trust that they the said [trustees] shall and do in the mean time, after the decease of the

5th Dg 50  
6th D 136  
8th D 214

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said *A. M. Daniel*, during the minority of each of the said children, pay unto the said *T. Daniel*, to be by him applied or not as he shall think proper, and after his decease do and shall, by themselves or himself, pay and apply the dividends and annual proceeds of the presumptive share of every such child in the said trust funds and premises for or towards *his or her* respective support, maintenance, and education until such *his or her* respective share shall become vested, or *he or she* shall previously die." There followed a power to sell all or any part of the expectant share "of each of the said sons" in the trust funds, and apply the same for his preferment or advancement, though his share should not then have become vested.

There were eight children of Mr. and Mrs. *Daniel*, three sons and three daughters who attained twenty-one, and two sons who died in early infancy. Mrs. *Daniel* being dead, the question now was whether the fund was divisible in sixths among the sons and daughters who attained twenty-one, or whether it belonged to the three sons only. The Master of the Rolls decided in favour of the latter view. One of the daughters and her husband appealed.

*Beaumont*, for the Appellants, having opened the case, was stopped by the Court.

*Bagshawe*, Q.C., and *W. S. Owen*, for the Respondents:—

We may conjecture that there has been an accidental omission, but it is only a conjecture, there being no ambiguity in the words of the operative clause. The words "who being a son or sons" are a part of the description of the takers. If the daughters took shares at all, their interests were evidently intended to be subject to a contingency. But what was the contingency? No doubt this settlement was made up out of forms providing for daughters as well as sons, but it is mere conjecture that the limitations in favour of daughters were omitted by accident, and not struck out on purpose. *Cholmondeley v. Clinton* (1) supports our case. In *Langston v. Langston* (2) there were words, such as do not occur here, to shew an intention that the eldest son should take. The

(1) 2 Jac. & W. 1.

(2) 2 Cl. & F. 194.

words "his or her executors and administrators" are pure surplusage, and much weight, therefore, ought not to be given to them.

JAMES, L.J. :—

With all respect to the decision of the Master of the Rolls, and with a full sense of the importance of not allowing ourselves in the construction of instruments to import into them by conjecture an intention which they do not express, I think this case reasonably clear. In the first place, there is a recital of an intention to make provision for the children of the marriage. Then the trust commences with the words "for all and every the child and *children*," and concludes with "and if there shall be but one such child, the whole shall be in trust for such one or only child and *his or her* executors and administrators." There follows a provision that, after the decease of the wife, the trustees should, during the minority of each of the said children, pay to the husband, and after his decease, apply the income of the presumptive share of every such child for or towards *his or her* maintenance and education until *his or her* share should become vested, or *he or she* should previously die. There is, therefore, on the face of the settlement abundant evidence of an intention to provide for children both male and female. The only reason for excluding daughters is the insertion of the words "who being a son or sons shall attain the age of twenty-one years," which are said to be a necessary qualification of the takers, and to confine the class to male children. These words are part of a common form, and we must deal with the case as if the clause had run "for all and every the child and children who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall—and if there shall be but one such child then the whole shall be in trust for such one or only child, his or her executors and administrators." The only question then would be what is to be supplied; and as maintenance is given during minority, I should have no difficulty in supplying "attain twenty-one." If we were to affirm the decision of the Master of the Rolls, I think we should be adhering to the mere letter and disregarding the spirit of the instrument.

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C. A. MELLISH, L.J.:—

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I am of the same opinion. If the operative part of an instrument is clear, effect must be given to it, but if it is obscure and inconsistent, we may resort to any other part of the instrument to explain it. Here, if the declaration of trust had contained only the words "for all and every the child and children who being a son or sons shall attain the age of twenty-one years," every one must have said that if the intention was to provide for sons only the sentence was most awkwardly framed, and that it was impossible to say why "child and children" had been used instead of "son and sons," and it would have been impossible to avoid thinking it very probable that there had been an accidental omission of some words applying expressly to daughters, though I do not think that this probability would have been enough to enable the Court to hold the daughters entitled. But when we look at the concluding part of the declaration, "and if there shall be but one such child, in trust for such one or only child and *his or her* executors and administrators," we find that the words "his or her" create an ambiguity, and we may look at the rest of the instrument to remove it. When we look at the recital and the maintenance clause, we find clear indications of an intention to provide for daughters as well as sons, and as the daughters have attained twenty-one, I am of opinion that they are entitled to share in the fund.

BAGGALLAY, J.A.:—

I am of the same opinion; and I think that this conclusion may be arrived at on the operative part of the instrument alone, without reference to the recital or to the power of maintenance. The operative part speaks first of "children," and then of a single "child, *his or her* executors and administrators." The words "his or her" shew that "child" in the latter part of the clause means "son or daughter." The settlor therefore has shewn in what sense he uses the word "child." We may then read the clause thus: "Upon trust for all and every the son or daughter, sons or daughters, who being a son or sons shall attain the age of twenty-one years, and if there shall be only one such son or daughter, upon

trust for such one or only son or daughter, his or her executors or administrators." Thus read, the gift is a gift to sons and daughters with a qualification as to the sons alone. The settlor, no doubt, intended a qualification as to the daughters also, but so far as the operative part is concerned, he has omitted it, though probably it might be implied from the maintenance clause. I think, therefore, that, taking the operative part alone, daughters as well as sons are objects of the gift; and this conclusion is much strengthened by the recital and the maintenance clause.

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BLACKBURN, J.:—

I am of the same opinion. The first words of the declaration of trust include all the children, daughters as well as sons, and daughters must therefore be objects of gift unless the words "who being a son or sons" are intended to express a necessary qualification of all persons who are to take. The concluding words "*his or her* executors and administrators" shew that in some cases a daughter might take. The words "who being a son or sons shall attain the age of twenty-one years" cannot therefore be construed as expressing a qualification of all the objects of gift, but only a modification of the gift to such of the children as were sons. Mr. *Bagshawe* argued that the words "his or her executors and administrators" were surplusage, and that therefore much regard was not to be had to them; but I cannot accede to that argument. The language of the maintenance clause shews, further, that daughters were intended to be included. There might have been a difficulty if any of the daughters had died under twenty-one, but as they all attained twenty-one this question does not arise.

Solicitors: *Few & Co.; Cole, Cole, & Jackson.*

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SWABEY v. GOLDIE.

[1873 S. 100.]

Will—Construction—Distribution per Capita or per Stirpes.

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A testatrix gave the income of one moiety of her residuary estate to her daughter *Margaret* for life, and the income of the other moiety to her daughter *Mary Ann* for life, and then directed her trustees to stand possessed of one moiety of her estate from and after the death of *Margaret*, and of the other moiety from and after the death of *Mary Ann*, in trust to pay, transfer, and assign the same unto and amongst all the children of *Margaret* living at her decease, and the issue then living of any children of hers who should have died in her lifetime, and all the children of *Mary Ann* who should be living at her decease, and the issue then living of any children of hers who should have died in her lifetime, to be equally divided between or among them if more than one, and if there should be but one such child and no issue of any deceased child, or no such child and only one grandchild or such other issue, then the whole to such one child, grandchild, or other issue; the issue of a deceased child taking their parent's share:—

Held (affirming the decision of *Bacon*, V.C.), that the full and elaborate language of the will, which clearly imputed a distribution of the whole fund *per capita* among the children of both daughters, could not be controlled on the ground of the inconvenience of keeping a moiety of the fund in suspense from the death of one daughter till the death of the other, though in some cases, where the language was very concise and obscure, the Court had held the share of each of the tenants for life divisible on his death among his own children exclusively.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* on the construction of a will.

The testatrix, by will dated the 15th of October, 1832, directed her trustees to stand possessed of the proceeds of her residuary estate upon trust to invest them as therein mentioned, and to stand possessed of the trust moneys and the investments thereof, “upon trust to pay, apply, and dispose of one moiety of the dividends, interest, and annual proceeds thereof,” during the life of her daughter *Margaret Simpson*, to such persons as *M. Simpson* should appoint, and in default of appointment, to *M. Simpson* for her separate use. “And as to the other half part or share of the said residue of the said trust moneys and the stocks, funds, and securities on which the same shall be invested,” upon trust to pay, apply, and dispose of the income thereof during the life of the testatrix’s daughter *Mary*

Ann Swabey, “in like manner and subject to the like directions for the separate and exclusive use and benefit during the natural life of my said last named daughter, as I have hereby expressed of and concerning the other moiety of the said dividends, interest, and annual proceeds for the benefit of my said daughter *Margaret Simpson*.” She then proceeded as follows:—

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“And I further direct that the said [trustees] and the survivor of them, his executors, administrators, and assigns, shall stand possessed of one equal half part or share of the said trust moneys, stocks, funds, and securities arising from the residue of my personal estate, from and immediately after the death of the said *Margaret Simpson*, and of the said other half part or share thereof from and after the death of the said *M. A. Swabey*, upon and for the trusts and purposes and subject to the provisoes, declarations, and directions hereinafter expressed and declared of and concerning the same (that is to say), in trust to pay, transfer, and assign the same unto and amongst all and every the child and children of my said daughter *M. Simpson*, begotten or to be begotten, living at the time of her decease, and the lawful issue then living of any child or children of her my said daughter *Margaret Simpson* who shall have died in her lifetime, and all and every the child and children of my said daughter *M. A. Swabey*, begotten or to be begotten, living at the time of her decease, and the lawful issue then living of any child or children of her my said daughter *M. A. Swabey* who shall have died in her lifetime, to be equally divided between or among them, if more than one, share and share alike, and if there shall be but one such child and no issue of any deceased child, or no such child and only one grandchild, or such other issue, then the whole to such one child, grandchild, or other issue. Nevertheless my will is that the issue of any such deceased child or children shall take the same and no greater share than his, her, or their parent or parents would have been entitled to if then living.”

The testatrix died in 1838. *M. A. Swabey* died in 1869, leaving ten children and one grandchild, the issue of a deceased child. The trustees thereupon divided one moiety of the residuary estate in elevenths among the children and grandchild.

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Margaret Simpson died in 1872, leaving two children and six grandchildren, the children of a daughter who had died in her lifetime. The question was then raised whether the view which had been acted upon in 1869 was correct, and this bill was filed to take the opinion of the Court.

Vice-Chancellor *Bacon* decided that the entire residuary estate was divisible in fourteenths, the issue of the two daughters forming only one class. The children of Mrs. *Simpson* appealed.

Kay, Q.C., and *Macnaghten*, for the Appellants:—

We contend that at the death of each daughter her moiety became divisible among her issue. The principle of the cases is, that where the fund is to be kept together and divided at one period, there is no reason for inferring distribution *per stirpes*; but if it is divisible at different times, then the distribution *per stirpes* is to be preferred: *Hawkins* on Construction of Wills (1); *Willes* v. *Douglas* (2); *Arrow* v. *Mellish* (3); *Waldron* v. *Boulter* (4); *Turner* v. *Whittaker* (5); *Wills* v. *Wills* (6); *Jarman* on Wills (7).

In *Smith* v. *Streatfield* (8) there were directions which made the fund divisible at one time. Here we have directions for immediate division as to each moiety, and if the division is *per capita*, any immediate division on the dropping of the first life is impossible.

[BLACKBURN, J.:—The direction is that from and immediately after the dropping of a life the trustees are to hold that share in trust, &c., and not that they are at once to divide it.]

Jackson, Q.C., and *Kekewich*, for the Respondents:—

We admit that the argument *ab inconvenienti* has great weight where the language of the will is obscure, but it has none where the language is clear. All the cases referred to against us are cases of very concise and inaccurate language, which might, without doing any violence to it, be construed either way. Here we have a will which, though not skilfully framed, is full and ela-

(1) Page 114.

(2) 10 Beav. 47.

(3) 1 De G. & Sm. 355.

(4) 22 Beav. 284.

(5) 23 Beav. 196.

(6) Law Rep. 20 Eq. 342.

(7) 3rd Ed. vol. ii. pp. 181-183.

(8) 1 Mer. 358.

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borate, and its distinct terms cannot be departed from. *Abrey v. Newman* (1) and *Malcolm v. Martin* (2) shew this.

Macnaghten, in reply :—

Malcolm v. Martin has often been doubted, and is not in point, for there it was held to be only one period of division.

JAMES, L.J. :—

The construction which the Vice-Chancellor has put upon this will might have led to great inconvenience, though in the event it happens not to have done so ; but, having regard to the elaborate way in which the will is framed, and to the mode in which the testatrix with legal assistance has worked out her intention, it would be dangerous if we were to interpolate words, or to alter the words constituting the clause. There was an inconvenience, which the testatrix appears to have overlooked, in keeping a moiety of the fund, both principal and income, in suspense from the death of one tenant for life to that of the other, but everything else is against the Appellants. The testatrix first deals with one moiety, giving a life interest in it. Next she gives a life interest in the other. She then puts the two moieties together for the purpose of disposing of the capital as a whole. The context appears to me to be rather in favour of than against the literal construction. There is no direction for an immediate division when the daughter dies, but on her death the trustees are to stand possessed of that moiety in trust for division among a certain class, which is quite consistent with the view that the class might not be ascertained at once. In my opinion the appeal must be dismissed.

MELLISH, L.J. :—

I am of the same opinion.

BAGGALLAY, J.A. :—

I also am of opinion that the decision of the Vice-Chancellor was right. We must look to what the fund is, among whom it is to be divided, and when the division is to take place. The testa-

(1) 16 Beav. 431.

(2) 3 Bro C. C. 50.

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trix disposes of two moieties, keeping them distinct in the first part of the will and combining them in the second part, where they are given to a compound class consisting of children of *A.* living at her death, and children of *B.* living at her death. The disposition in fact amounts to this, "Subject to the above life interests, I give my whole estate among," &c. In every one of the cases cited by Mr. *Kay* a form of words was used which was ambiguous from its conciseness, and in four of them death was spoken of in the singular number, though several persons could not be expected to die at once.

BLACKBURN, J.:—

I am of the same opinion. [If the will had dealt with each moiety separately, giving it over in the same terms as those which have been used, there could have been no dispute. If the testatrix had consulted us we might have said, "Do you observe that you are making half the fund available to nobody from the death of one of your daughters till that of the other." And she would very likely have attached great weight to this, if what she was giving had been the whole provision for the family; but, for anything we know, it may have been nothing but pocket-money, and she might have said, "There is an inconvenience in that, but still I prefer this mode of division to a division *per stirpes*." To give effect to the contention of the Appellants, we must interpolate after the words "in trust to pay, transfer, and assign the same," the words "as regards the share of my daughter *Margaret*," and then further on, before the words "all and every the child and children of my daughter *Margaret Simpson*," the words "and as regards the share of my daughter *Mary Ann*, unto and amongst." That is putting in a great deal. The testatrix, if it had been called to her attention, might have preferred it, but on the other hand it might have defeated her intention.

Solicitors: *Burton, Yeates, & Hart; Few & Co.*

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Dec. 3, 6, 13.

Conversion into Personality—Reconversion into Realty—Election by Conduct—Trust for Sale, Proceeds to become Personal Estate—Rights of unpaid Legatees.

A testator, after giving certain legacies, devised a freehold house to A., B., and C., in trust for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to A., B., and C. A., B., and C. paid all the legacies except two out of other parts of the testator's estate, and kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, and the two legatees permitted their legacies to remain during all that time unpaid, without requiring a sale or any formal security on the house:—

Held, in a suit by the personal representative of C. against the real and personal representatives of the testator for the administration of his estate, that A., B., and C. had by their conduct elected to take the house as reconverted into real estate; that the assent of the unpaid legatees might be inferred; and bill dismissed accordingly.

The decree of *Hall*, V.C., reversed on further evidence.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

Edward Bigg, by his will, dated the 6th of January, 1820, after giving certain legacies, made the following dispositions:—"I give to my son *Edward Smith Bigg* and to my daughters *Sarah Anne Bigg* and *Emma Frances Bigg*, my executor and executrixes hereinafter named, their heirs and assigns, my freehold messuage or tenement in *Fenchurch Street*, and also my two freehold messuages or tenements in *Fenchurch Buildings, London*, to hold the same to my said executor and executrixes, their heirs and assigns, in trust to sell and dispose of the same, and convert the same into money, and the money arising by such sale to be considered part of my personal estate." The testator then bequeathed to his daughter *Anne Lucy Hallen*, for her separate use, the sum of £1000, to his daughters *Ellen Elizabeth Bigg*, *Lucy Maria Bigg*, and his sons *Smith Henry Bigg* and *William Robert Bigg*, the sum of £2500 each; and he then demised and bequeathed unto the said *Edward Smith Bigg*, *Sarah Anne Bigg*, and *Emma Frances*

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Bigg, all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, freehold, copyhold, and personal, to hold to them as tenants in common, their several and respective heirs, executors, administrators, and assigns, for ever.

The testator died on the 23rd of July, 1823, and his will was proved by *Edward Smith Bigg* and *Sarah Anne Bigg* alone on the 8th of November, 1823.

Besides the freeholds specified in the will, the testator died possessed of three freehold houses in *Middlesex*, and certain leaseholds, and other personal estate.

Edward Smith Bigg took possession of the real and personal estate, and paid out of the personal estate, irrespective of the leaseholds, the testator's debts and some of the legacies; but he was unable to pay all the legacies without having recourse to the freeholds and leaseholds.

In the year 1829 *Edward Smith Bigg*, *Sarah Anne Bigg*, and *Emma Frances Bigg* sold the freehold houses in *Fenchurch Buildings* for £1010. At the same time they attempted to sell the house in *Fenchurch Street*, but could not get the price at which it was valued, and it remained unsold up to the time of the filing of the bill.

In the year 1832 *Edward Smith Bigg*, *Sarah Anne Bigg*, and *Emma Frances Bigg* conveyed the three houses in *Middlesex*, which were not comprised in the trust for sale, to *Smith Henry Bigg* in satisfaction of his legacy of £2500.

The Defendants stated that *Edward Smith Bigg* and his two sisters, *Sarah Anne Bigg* and *Emma Frances Bigg*, were desirous of keeping the house in *Fenchurch Street*, both because it had been in the family some time, and because the property was rising in value. In the year 1838 *Edward Smith Bigg*, *Sarah Anne Bigg*, and *Emma Frances Bigg* joined in granting a lease of the house for twenty-one years to a tenant, in which the rent of £210 was reserved to them, their heirs and assigns. On that occasion *Edward Smith Bigg* laid out a considerable sum of his own money in improving the property. It was also proved that he expended some of his own money in payment of some of the legacies; and it was also stated by the Defendants that some of his sisters had advanced money for the same purpose.

In the year 1837 *Edward Smith Bigg* passed the residuary account of the testator's estate. At that time all the debts, funeral and testamentary expenses, were paid, and all the legacies, except those of £2500 each to *Ellen Elizabeth Bigg* and *Lucy Maria Bigg*, which remained unpaid at the time of the filing of the bill.

Emma Frances Bigg died intestate in May, 1844. *Edward Smith Bigg* was her heir-at-law.

Sarah Anne Bigg died in July, 1865, having by her will given her residuary real and personal estate to the children of her brother, *Smith Henry Bigg*. Administration with her will annexed was granted to her sister *Lucy Maria Bigg*.

In the year 1859 *Edward Smith Bigg* and *Sarah Anne Bigg* sold some of the leasehold property comprised in the residuary gift for £3000; and for the purpose of completing the title, *Edward Smith Bigg* took out administration to the estate of his deceased sister, *Emma Frances Bigg*.

After the death of *Sarah Anne Bigg*, *Edward Smith Bigg* sold another portion of the leaseholds for £2440. The remainder of the leaseholds still remained unsold at the time of the filing of the bill.

The residuary legatees, *Sarah Anne Bigg* and *Emma Frances Bigg*, and also their sisters *Ellen Elizabeth Bigg* and *Lucy Maria Bigg*, after their father's death, went to reside with their brother *Edward Smith Bigg*, and he paid them from time to time sums of money for pocket-money out of the income of their father's property for the time being remaining unsold, the rest of the income being expended by him in housekeeping for the family. But no written agreement was made, and no settlement was come to, either with *Sarah Anne* and *Emma Frances* as to their shares in the residuary estate, or with the other two sisters as to their legacies of £2500 each. A memorandum was, however, found after the institution of the suit, in the handwriting of *Edward Smith Bigg*, but without date and in the following terms:—

“Memorandum—That the legacies given by my father's will to my sisters *Ellen* and *Lucy* have been unpaid, and the principal sums of £2500 each are still due and payable upon his property, two-thirds of which are now my property, and one-third belongs to my sister *Sarah Anne Bigg*.”

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Edward Smith Bigg died in February, 1871, having by his will, dated the 7th of September, 1869, given his residuary real and personal estate to the children of his brother *Smith Henry Bigg*, share and share alike, and appointed his sister *Lucy Maria Bigg* his sole executrix.

After the death of *Edward Smith Bigg*, the Plaintiff, *Mary Mutlow*, who was a niece of *Emma Frances Bigg*, took out administration *de bonis non* to her estate, and she and her husband filed the present bill against *Lucy Maria Bigg* and *Smith Henry Bigg*, the executrix and heir-at-law of *Edward Smith Bigg*, praying for administration of the personal estate, and the execution of the trusts of the will of the original testator, *Edward Bigg*.

The principal object of the suit was to obtain possession of *Emma Frances Bigg's* share of the freehold houses in *Fenchurch Street*, which had greatly increased in value since the testator's death.

The Defendants by their answer set up the *Statute of Limitations*.

The Vice-Chancellor held that the trust was an express trust within the 25th section of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), and declared the Plaintiffs entitled to a decree for the execution of the trusts of the will so far as related to the unsold land. The decree, however, as drawn up extended to all the property devised in trust for sale. From this decree the Defendants appealed.

The appeal came on to be heard before the full Court of Appeal on the 12th of November, 1874, when the counsel for the Appellants relied upon an objection to the title of the Plaintiffs, which was not urged at the hearing before the Vice-Chancellor, namely, that *Edward Smith Bigg*, *Sarah Anne Bigg*, and *Emma Frances Bigg*, had elected to take the house in *Fenchurch Street* as real estate, and that the Plaintiffs, who were only the personal representatives of *Emma Frances Bigg*, had no title, even though the *Statute of Limitations* were no bar; and their Lordships, considering that the whole of the facts bearing on the question of the reconversion of the property into real estate were not before the Court, ordered the appeal to stand over, with liberty to the Plaintiffs to amend the bill and for the parties to put in fresh evidence.

The Plaintiffs accordingly amended the bill, making the children of *Smith Henry Bigg*, who were the devisees of the real estate of *Emma Frances Bigg*, Defendants, and the original Defendants put in a voluntary answer. The dealings with the property, as stated above, were thus fully brought before the Court. The Defendants also stated that the legacies to *Ellen Elizabeth* and *Lucy Maria Bigg* had in fact, since the filing of the bill, been satisfied out of the assets of *Edward Smith Bigg*.

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The appeal now came on again for hearing before the Court of Appeal.

Morgan, Q.C., and *Marcy*, for the original Defendants, *Lucy Maria Bigg* and *Smith Henry Bigg* :—

The whole facts, so far as it is now possible to ascertain them, being before the Court, it is clear that the residuary legatees elected to retain this freehold house in specie, and that it was, as between their real and personal representatives, reconverted into real estate. In that case the Plaintiffs have no interest independently of the effect of the *Statute of Limitations*. The three residuary legatees were absolutely entitled to the house subject to the payment of the testator's debts and legacies. In the year 1837 all the debts had been paid, and all the legacies, except those due to the two sisters *Ellen Elizabeth* and *Lucy Maria Bigg*. In 1832 the residuary legatees satisfied *Smith Henry Bigg's* legacy by the sale to him of another part of the estates not included in the trusts. If they had in like manner paid off the two sisters' legacies, there would have been no question as to their right to take the house as real estate. What difference could the non-payment of these two legacies make?

The evidence is conclusive that the legatees acquiesced in the postponement of the legacies, and it is exactly the same as if they had accepted a formal mortgage of the house instead of payment. It would be unreasonable that the Court should hold that land devised in trust for sale could retain for an indefinite time the character of personal estate although all parties interested acquiesced in its being held in specie.

The Defendants expressly state that the object of the three

C. A. residuary legatees, and indeed of the whole family, was not to sell
 1875 the property, both because it had been in the family some time,
 { and because it was increasing in value; and the whole circum-
 MUTLOW stances of the case, especially the payment of *Smith Henry Bigg's*
 v. legacy by means of the sale of another part of the property,
 BIGG. the granting of a lease of the house in *Fenchurch Street*, and the
 — laying out of money by *Edward Smith Bigg* in improving the
 property, confirm that view. We contend, therefore, that they
 both had the power to elect, and did elect, to take the house as real
 estate: *Crabtree v. Bramble* (1); *Davies v. Ashford* (2); *Griesback*
 v. *Freemantle* (3); *Pulteney v. Darlington* (4); *Cookson v. Cook-*
 son (5); *Fletcher v. Ashburner* (6).

With respect to the *Statute of Limitations*, we contend that the Vice-Chancellor was wrong in holding that there was an express trust under the 25th section of the 3 & 4 Will. 4, c. 27. There was no relation of trustee and *cestui que trust* created between the devisees in trust for sale and the legatees. There was only a direction to the trustees to turn the estate into money so that it might become part of the testator's personal estate in the hands of the executors. The Plaintiffs, as personal representatives of *Emma Frances Bigg*, can only claim a share as residuary legatees.

If the executors and trustees for sale had been different persons the right of a residuary legatee against the executors would have been now barred by the statute, and the legatee could not have proceeded against the trustees to force them to sell the estate: *Dickenson v. Teasdale* (7); *Knox v. Kelly* (8); *Young v. Wilton* (9); *Shelford's Real Property Statutes* (10); *Philipppo v. Munnings* (11); *Pawsey v. Barnes* (12).

Davey, Q.C., for the children of *Smith Henry Bigg*, supported the same contention as to the reconversion of the property into real estate, and referred to *Dixon v. Gayfere* (13).

(1) 3 Atk. 680.

(2) 15 Sim. 42.

(3) 17 Beav. 314.

(4) 1 Bro. C. C. 223.

(5) 12 Cl. & F. 121.

(6) 1 Wh. & T. L. C. 741, 3rd Ed.

(7) 1 D. J. & S. 52.

(8) 6 Ir. Eq. Rep. 279.

(9) 10 Ibid. 10.

(10) 7th Ed. p. 218.

(11) 2 My. & Cr. 309.

(12) 20 L. J. (Ch.) 393.

(13) 17 Beav. 483.

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Dickinson, Q.C., and Bunting, for the Plaintiffs :—

We contend, first, that the three residuary legatees, *Edward Smith Bigg, Sarah Ann Bigg, and Emma Frances Bigg*, were never in a position in which they could elect to treat the estate as reconverted into realty. However distinctly they might have expressed their desire to elect, whether verbally or in writing, they had no power to elect so long as any of the legacies remained unpaid. Whether the legatees consented or not makes no difference. No doubt they consented to postponement of payment for one reason or another; but there is no proof that they agreed to accept a permanent charge on the estate instead of a right of payment under the trusts of the will. The undated memorandum is clearly subsequent to the death of *Emma Frances Bigg*, whom we represent, and is itself a proof that no such arrangement was made in her lifetime. If the legal estate had been in other persons as trustees, they were never in a position to say to them, "All the purposes of the trust for conversion are at an end; convey the legal estate to us." They were never completely *domini* of the estate: *Sisson v. Giles* (1); *Barker v. May* (2).

In the second place, we say that the residuary legatees never did elect to hold the house as land. It is true that they postponed the sale of it, but that was merely for the purpose of waiting for a better market, as the property was rising in value; and it is in evidence that in 1829 they did actually attempt to sell it. The mere fact of keeping the property unsold is not an election to take it as land. They dealt with the leasehold property in the same way, selling from time to time as they had a good opportunity. The fact of their granting a lease of the house is not inconsistent; it would possibly make the freehold sell better.

In the third place, we contend that we are entitled to a general administration decree. The Plaintiff *Mary Anne Mutlow* is the administratrix of *Emma Frances Bigg*, and there is no statute which prevents our getting a decree against the Defendant *Lucy Maria Bigg*, who represents the original testator *Edward Bigg*, for the administration of his estate. In the year 1859, which is less than twenty years ago, some part of the testator's leasehold estate was still in the hands of *Edward Smith Bigg* and *Sarah*

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C. A. *Anne Bigg*, his surviving executors, unsold, and they then sold it for £1100. On that occasion *Edward Smith Bigg* took out administration to *Emma Frances Bigg* to complete the title, but the two survivors received the purchase-money as executors. In 1872, *Lucy Maria Bigg*, as the administratrix of her sister *Sarah Anne Bigg*, received a sum of money as her share of the residuary estate of the original testator. Surely, we may call her to account for this.

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JAMES, L.J.:—

It is not necessary, I think, to deal with the part of the case which was before the Vice-Chancellor. The only question before him was as to the effect of the two sections of the *Statute of Limitations*; but there was a point which was raised when the matter was before the Court of Appeal on a former occasion, and which appeared to the Court as then constituted not to have been sufficiently raised on the pleadings and evidence, namely, as to the effect of the conduct of the parties in producing what is called in this Court a reconversion. This matter, therefore, is now fully brought before us under circumstances shewing what great danger there frequently is in endeavouring to give an effect to that which has been done for a long course of years, contrary to that which people themselves have been doing, when they have had no opportunity of explaining the circumstances under which they began doing it. In this case the testator died as far back as the year 1823; from the year 1823 until the filing of the bill on the 31st of January, 1873, that is very nearly fifty years, a certain portion of the real estate of the testator—his remaining real estate—has been enjoyed and dealt with as real estate; but in the year 1873 a person having some interest in the personal estate of a legatee under the will of the original testator who died in 1823, has filed a bill for the purpose of having it declared that that property which has been enjoyed as real estate for fifty years has all along been in contemplation of the Court of Equity personal estate, and is now to be sold and dealt with as personal estate between all the persons who were interested in the personal estate of this testator.

Now the foundation of this claim was this, that the testator,

being possessed of personal estate of some considerable amount, but apparently not sufficient for the payment of his debts, legacies, funeral and testamentary expenses, made a will by which he devised some property in the first instance to be sold and the proceeds to be added to his personal estate. That is the mode in which he makes the trust, and then he gives legacies to a very considerable amount, and he makes the same three persons whom he has appointed the trustees of his property so devised his executors and residuary devisees and legatees of all his estate. That being so, the trust, no doubt, ought to have been immediately executed. If they had in due form followed the testator's direction the property ought to have been sold in 1824, or as soon as it could be reasonably done after, and the legacies paid. What the residuary legatees, who were the trustees, did was this: they put the estate up for sale, and they did not get a price which they liked for it; they then found the means of paying off some of the legatees, and even some of the members of the family joined with them in finding the money. There was another considerable legacy which required to be paid. Rather than sell this property they conveyed part of the residuary estate of which they were tenants in common to this legatee in satisfaction of his legacy. Well, then, after that, instead of selling this property, they do that which would have been a breach of trust, they make a lease for a long term of years; more than that, one of them lays out his own money to a considerable amount in improving part of the property. That is all done by these three together; and as a further proof of what they meant to do with the property, some leaseholds which had been sold, which they would have been entitled to in the first instance, they continue to maintain in specie, and take in specie as tenants in common under this residuary benefit, instead of selling them in satisfaction of their debts as existing for the purpose of paying the legacies.

Under these circumstances it appears to me that they intended to elect, and did elect, to keep that property as real estate; they postponed the sale of it indefinitely; one of them lays out money upon it, and they grant a lease, in which lease the rent is reserved to them and their heirs, dealing with it as owners. The only real difficulty, as far as there is a difficulty in this case, arises from

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the fact that there were some legacies which remained during all this time, and remained up to a very recent period, unpaid legacies which would have been payable out of the personal estate, and would have been payable of course out of that personal estate increased by the proceeds of the sale of this real estate, if necessary; and it is said that the existence of those unpaid legacies would prevent the usual conclusion which this Court arrives at, that the parties had elected to take as realty that which was realty, instead of the estate being sold and the proceeds divided between them. How far they could have been held to have elected to take it as real estate, if what they were doing was really a breach of trust, and if there really was a claim which was outstanding inconsistent with what they were doing, it is not necessary to inquire. But during all this time it appears the legatees were satisfied. As far as we have any evidence whatever, the legatees understood that the parties wanted to keep the property in specie, and they never had the slightest practical interest in the question whether the property was taken as realty or personalty by the trustees and residuary legatees. There might be some little difference perhaps in the mode of realizing the amount of the legacies, but practically and legally what the legatees had was no direct charge, no direct right to have this property sold for the payment of their debts and legacies, but they had a right to have their legacies paid out of the personal estate, and as a consequence of that, if necessary, and so far and no further, to have the personal estate added to from whatever fund was available for that purpose. That was their right, and there is a charge on the whole estate. They had a charge on the personal estate, they had, in the words of the will, a charge on the whole of the real estates, and they had a charge upon that particular part of the estate, just the same charge practically as they had upon the rest. Therefore the legatees had no interest whatever in the question whether the other persons should or should not take it as realty or personalty, and having no such interest, it appears to me the proper inference to be drawn from all that was said and done in the matter was, that they perfectly acquiesced in all that was going on. They probably did not know the difference between charge and trust; it was

no matter of consequence to them to inquire into, but they acquiesced in what was done, and therefore it appears to me that as they allowed their legacies to remain, perhaps on the credit of *Edward Smith Bigg*, the residuary legatee, or knowing that he had full assets to resort to, they could not complain of any breach of trust. The existence of the right, such as it was, in them would not prevent the residuary legatees from exercising their election to take the property either in one character or in another. Just in the same way, it appears to me that if there had been any ordinary trust of an estate to sell and pay off a mortgage, and then to divide the surplus between three particular persons, and those three persons arranged with the mortgagee, and said, We do not want to have the mortgage paid off, and we wish to take the estate as realty and not personalty, the existence of a mortgage would not prevent them being in the same position as any other owners of such a trust estate. I am of opinion that under these circumstances the residuary legatees have expressed sufficiently their intention to elect, and that the charge on the estate, so far as it was a trust in favour of the particular legatees, could not operate to prevent their making and giving effect to that election.

Then there is another part of the case, as to the general residuary estate of this gentleman, who died in the year 1823, the final accounts of which were passed sometime in 1837. This being in the second generation, all the next of kin living at that time, and all the people interested, having years and years ago been quite satisfied with everything that had been done, had never made a claim, and nobody from that time until this suit was instituted has endeavoured in any way to interfere with what has been done with the property, or to upset any of the former arrangements. But it was said that there were some assets admitted to be in their hands. On the contrary, what is alleged with regard to the assets is that they were dealt with in a manner which shewed that they belonged to the trustees themselves and not to the testator's estate.

Under these circumstances I am of opinion that the case fails altogether, and that the bill ought to be dismissed.

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I am of the same opinion. The evidence proving that the three residuary legatees wished to take this as real estate, assuming that they had the power to take it as real estate, seems to me to be so strong as to leave the question beyond all possibility of doubt. First of all, a great number of years have passed, and you find them leasing the property as if it were their own. Then you find the payment of one of the legacies out of the other real estate which has been left, and a dealing with this estate in a way as if it were their own. I do not think any of the cases which have been cited come at all near the present with regard to the strength of the evidence that the parties intended to take the property as real estate. It is said that they did not intend to take it as real estate, because in the first instance they put it up for sale and withdrew it, finding that they could not get a sufficient sum. From that it is assumed that they were always intending to have it sold. In a certain sense people possessed of property which they only keep because it is of value to them, may be said to intend to sell at a favourable opportunity. Here was property in the middle of the City of London, which evidently *Edward Smith Bigg*, who was the brother who managed the property altogether for his sisters, thought was property likely to increase in value, and that, no doubt, was a perfectly good reason for not selling it. If he wished it to continue to be kept as a permanent investment, I do not see how it is possible to come to any other conclusion than that he desired to keep it as real estate. That being so, the only real question is whether the circumstance of two of the legacies not being paid during *Edward Smith Bigg's* lifetime does, as a rule in this Court, make it impossible that they should have elected to take it as real estate. If (as was fairly put in the argument) the residuary legatee and the trustees for sale were different persons, the residuary legatees, not having the legal estate in them, could not elect to take the property as real estate so long as the trustee kept it directly under the trust for sale without the consent of the persons who were entitled to call on the trustees to sell for the purpose of paying off the legacies, be-

cause, as long as the trustees held it, it was their primary duty to sell it.

Therefore, in that state of things, if they wanted to take it as real estate they would have to obtain the assent of the legatees. At the same time, if the legatees assented to the trustees that it should be held by the *cestuis que trust* as real estate, it being understood that they were to continue to have the charge on it, and in the meantime receive the interest, I do not see why the trustees should not carry out that intention. Here the trustees and the residuary legatees are the same persons. What difference does that make? Of course if a very short time had elapsed the Court would, I think, require stronger evidence where there were legacies outstanding than if the legacies had been paid. At the same time it must be perfectly possible for the legatees to give such a consent as would justify the residuary legatees in treating the property as real estate, and if you can clearly see that the condition of things is such that the real position of the legatees is not injured in the least by their giving that consent, then the Court would infer that consent was given on slight evidence. In the present case the evidence is that the two sisters, whose legacies remained unpaid lived all their lives with their brother, left the principal with their brother, although they received from time to time sums on account from him, allowing him to deal with the property just as he pleased. They perfectly well knew, as is proved by the evidence of *Lucy Maria Bigg*, that he wished, and the other two sisters wished, to keep the property; they all assented to its being kept. Something was said about their wishing it to be kept because it was family property. I rely very little on that. Some reference was made to the fact that they wished it to be kept because they knew it was very valuable; they were all near relations to each other, all interested in the property being kept provided that it was the best thing to be done for the interest of everybody. Therefore I think we may fairly infer that they did assent to its being kept as real estate; and certainly it is a most inconvenient thing that property which really is real estate should remain for an indefinite time—fifty years, as in this case—and that it should be treated all

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that time as personal estate. Therefore where so many years have elapsed there is a stronger reason for assuming it had been treated as real estate with the assent of all persons whose consent was necessary. Therefore it appears to me in this case we are perfectly justified in assuming, that with the consent of the legatees and all the rest of the family it was agreed that this should be kept as real estate. I agree entirely with what Lord Justice *James* has said as to the second point.

BAGGALLAY, J.A. :—

I am of the same opinion, and for the same reasons. The only additional circumstance which I think it necessary to allude to is, that during the whole period of fifty years no member of the family who could have raised this question ever thought it desirable to raise it, and the question is now raised by representative persons who took out administration to *Emma Frances Bigg* one week before the bill was filed.

JAMES, L.J. :—

The bill must be dismissed with costs; but that will include the costs of only one hearing, namely, the present. The costs of the hearing before the Vice-Chancellor and of the former hearing before the Court of Appeal will not be allowed.

Solicitors for Appellants: *Prior, Bigg, Church, & Adams.*

Solicitors for Respondents: *Singleton & Tattershall.*

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[1874 A. 54.]

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Dec. 13, 11.

Will—Restraint of Marriage—Second Marriage of a Man.

A condition in restraint of the second marriage whether of a man or a woman is not void.

A testatrix gave the income of certain property to her niece (who was her adopted daughter) and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived his wife and married again :—

Held (reversing the decision of *Hall*, V.C.), that the proviso was valid, and that the gift over took effect.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

Mrs. *Frances Jackson*, a widow, by her will, dated the 7th of March, 1862, bequeathed the residue of her estate and effects to *T. Allen* and *W. H. Jackson*, whom she appointed her executors, upon trust out of the annual income to pay to her niece and adopted daughter, *Ellen Ada Jackson*, the wife of the Defendant, *Robert Noble Jackson*, the annual sum of £40 for her life for her sole and separate use, and, in the next place, to pay the whole remaining income unto her nephew, the Defendant *R. N. Jackson*, and the said *Ellen Ada Jackson* and their assigns during their joint lives, and after the decease of either of them then to the survivor during his or her life for their, his, or her own use and benefit. Provided, nevertheless, and she declared her will to be, that if the said *Ellen Ada Jackson* should depart this life in the lifetime of her husband, the said *R. N. Jackson*, and he should marry again, then she directed her said trustees and the survivors of them to stand possessed of the said trust property upon the trusts therein-after declared. And after the decease of her said niece and her surviving husband (if any), and subject to his marrying a second wife as aforesaid, she directed the said trustees or trustee to stand possessed of the said trust property in trust for the children and grandchildren of her said niece, *Ellen Ada Jackson*, as therein

(1) Law Rep. 19 Eq. 631.

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mentioned, and in default of children or grandchildren of her said niece, then in trust for the children of the testatrix's sister, *Jane McCormick*, who should be living at the time of the death of her said niece without issue, in equal shares as tenants in common. The will contained powers of maintenance and advancement for the benefit of the infant children.

By a codicil the testatrix gave *Jane McCormick* an annuity out of the income of the trust property.

The testatrix died in January, 1863.

Ellen Ada Jackson died in January, 1864, without issue.

In January, 1874, her husband, *R. N. Jackson*, married again.

The trustees filed the present bill against *R. N. Jackson* and Mrs. *McCormick* and her children, praying for execution of the trusts of Mrs. *Jackson's* will, and for a declaration that *R. N. Jackson* had forfeited his life interest in the trust property.

The Vice-Chancellor held that the proviso defeating the life estate of the husband on his second marriage was void, and that he was entitled to the income of the property notwithstanding his second marriage.

Mrs. *McCormick* and her children appealed from this decision.

Fry, Q.C., and *Smart*, for the Appellants :—

The condition in restraint of the second marriage of the husband is valid. Conditions in general restraint of marriage of an unmarried person, whether a man or a woman, were considered at common law to be against public policy, and therefore void; but that rule never extended to special restraints, such as against marriage with a particular person, or at a particular time, or without consent: *Younge v. Furse* (1); *Harvey v. Aston* (2); *Perrin v. Lyon* (3); *Scott v. Tyler* (4); *Haughton v. Haughton* (5). Nor did it extend to the second marriage of either a man or a woman. With respect to a woman, it has been expressly held that such a condition is valid, whether the person who imposes it is the first husband or a stranger: *Evans v. Rosser* (6); *Newton v.*

(1) 8 D. M. & G. 756.

(2) 1 Atk. 361.

(3) 9 East, 170.

(4) 2 Wh. & T. L. C. 125, 3rd Ed.;

S. C. 2 Bro. C. C. 431.

(5) 1 Moll. 611.

(6) 2 H. & M. 190.

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Marsden (1). And there is no distinction in principle between the second marriage of a man and of a woman. By the common law second marriages of all persons are discountenanced and considered bigamy. And by the *Lex Julia* in the old Roman law, a man might impose a restriction upon his widow marrying again, putting her to her election either to abstain from marriage or to lose her legacy; and a woman could impose a similar restriction on her husband. The common law followed the same principle as to second marriages, and by the custom of Gavelkind the husband of a woman who died seised forfeited his freebench if he married again: *Viner's Abr.* Gavelkind (2); *Low v. Peers* (3).

Such a restraint is a very reasonable one, for in the case of a second marriage the interests of the first family have to be considered, and in that view there is no reason applicable to a woman which does not apply with equal force to a man. We say, therefore, that there is neither law, nor authority, nor reason for not extending the rule which establishes the validity of a condition in restraint of the second marriage of a woman to the second marriage of a man.

But in the present case we also contend that the gift in the event of the husband marrying again is an alternative limitation, and not a gift over on forfeiture of the life estate. The gift may not be expressed in skilful language, but if the frame of the will is considered, it is clear that the gift is only a gift to the husband so long as he should remain unmarried; and a limitation over after such a gift would be good even in the case of an unmarried person: *Heath v. Lewis* (4); *Potter v. Richards* (5); *Webb v. Grace* (6).

Dickinson, Q.C., and E. T. Holland, for R. N. Jackson:—

With respect to the form of the limitation, the distinction is clearly established between a gift to a man until he does a particular thing, and when he does that thing then over, and a gift to a man with a condition forfeiting his estate if he does a particular act. In the latter case, if the thing to be done be against public

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(1) 2 J. & H. 356. *Spink 15/34* (4) 3 D. M. & G. 954.

(2) D. 4.

(3) 4 Burr. 2225. (5) 24 L. J. (Ch.) 488. *1 Jan 1854 62*

(6) 2 Ph. 701.

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policy the gift over is void, although in the former case it may be supported. The distinction may or may not be reasonable, but it is well established, and the Courts are bound to uphold it. The present is clearly a condition of forfeiture, and the fact that the testator might have avoided the difficulty by wording the gift otherwise, makes no difference.

With respect to the rule against restraint of marriage, it is useless to conjecture on what ground it was originally founded, or whether the same grounds of public policy may or may not exist now. At the present time there exists a well-established rule that a condition in restraint of marriage forfeiting a previous estate is void, with certain exceptions; and unless the Appellants can bring themselves within those exceptions, the Court is bound to act upon the rule, and not to make fresh law for each case. One of these exceptions is restraint on the second marriage of a woman, which has been recognised in recent cases; but there is nothing in the reasoning of those cases to lead the Court to extend the doctrine to the second marriage of a man. And in all the cases in which the restraint of marriage has related to a man the expressions used are perfectly general, and there is nothing to shew that the Court was referring to men who had been never previously married. In fact, for anything that appears in the reports, some of the cases may have been those of men previously married: *Baker v. White* (1); *Scott v. Tyler* (2); *Morley v. Rennoldson* (3); *Lloyd v. Branton* (4); *Marples v. Bainbridge* (5); *Lloyd v. Lloyd* (6).

Langworthy, for the Plaintiff.

JAMES, L.J.:—

It is somewhat singular that, although something very like the question involved in this case was decided in the case of *Evans v. Rosser* (7), yet the exact point itself is now for the first time to be decided.

(1) 2 Vern. 215.

(2) 2 Wh. & T. L. C. 125, 3rd Ed.

(3) 2 Hare, 570.

(4) 3 Mer. 108.

(5) 1 Madd. 590.

(6) 2 Sim. (N.S.) 255.

(7) 2 H. & M. 190.

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It seems to have been laid down by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. That, of course, can be the only principle which can be the foundation of any rule at all on the subject. The general restraint of marriage, for some reason or other, probably a good reason, is to be discouraged, and a condition subsequently annexed by way of forfeiture to a marriage is therefore void. That is the law both as to man and woman; but it has been most distinctly settled that with regard to the second marriage of a woman, that law does not apply, that whether the gift be a gift to a widow by a husband or a gift to the widow by some other person, the law does not apply to that case, and that such a condition is perfectly valid.

Now, there is no Act of Parliament which has provided, and there is no decision of any Court whatever which has established, that there is any distinction whatever between the second marriage of a woman and the second marriage of a man; and in the absence of any decision to the contrary, I am myself unable to see any principle whatever upon which the distinction can be drawn between them; and in truth, so far as there is any law at all upon the subject, the most ancient common law perhaps that we have in the country, the law of Gavelkind in *Kent*, has expressly provided that the second marriage of a husband entitled to freebench in his wife's estate is to operate as a forfeiture of that freebench; and it is difficult to understand any principle of public policy which would make that a right thing in *Kent* and an improper thing in *Surrey*. The case before us seems to me to shew what immense mischief one would be doing if one were to introduce a different rule of law in the case of a widower to that in the case of a widow. Now, in the case of a widow, it has been considered to be very right and proper that a man should prevent his widow from marrying again. Probably, if she were a widow with children, he might think that his children would not be so well cared for and protected if his widow formed a second alliance and became the mother of a second family. That might perhaps have been the origin of the exception, and it was held, when the thing came to be applied, that it might very well apply to a gift by a stranger

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who was not the husband. Supposing we had the case of a married woman having a property which she had power to dispose of by her will, and she left it to her husband by reason of his being the widower, and for the purpose of enabling him to perform his duties properly as the head of the family which she may have left, it would, it seems to me, be monstrous to say that when she provided for the contingency of the husband marrying a second time and having a new wife and a new family, she should not be able to say, "In that case he is to lose the estate, and it is to go over for the benefit of my children." In this particular case it was not the wife who was doing it, but it was a person who places herself in the position of the wife—the wife's mother—and who says, making a provision for her adopted daughter, that she gives her the income of her property for her life, and then gives it, after her death, to her surviving husband, evidently in his character of widower, with a declaration that if he should marry again it should go over to the child of the daughter who was the first object she intended to provide for—a most reasonable and proper provision, with respect to which it seems impossible to suggest that there is any ground of public policy against it. On that ground simply, that there is no distinction in principle or authority between the second marriage of a man and the second marriage of a woman, I am prepared to say that the law should be the same as to the one as to the other.

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In this particular case it possibly might not have been absolutely necessary to decide that, because, having read this will over from beginning to end, and looking at the testatrix's own declaration as to what she meant, I cannot bring myself to the conclusion that this was in any respect other than a limitation to the husband while remaining a widower; that it was, in fact, a case of successive limitations. The gift, however, in the first instance, is expressed as a gift to him for life, with a condition defeating it which may bring it within some of the cases, and perhaps we ought not to appear to overrule them without more necessity for doing so. On the first ground, I am of opinion that the gift over on the marriage of a widower is exactly on the same footing as a gift over on the marriage of a widow.

MELLISH, L.J. :—

I am of the same opinion. The Vice-Chancellor, in giving his judgment in this case, not unnaturally said that he would be making a new law if he held that this gift over was good. I should be sorry to contravene that rule, as far as it is properly applicable, although I may observe that the whole of the rules of equity, and nine tenths of the rules of common law, have in fact been made by the Judges. To a certain extent, I suppose, we have the same authority as our predecessors; but we are limited by this, that where there has been a rule established by our predecessors, we have no right to alter it, and we are bound by that established rule just as much as we should be bound by an Act of Parliament. But when what is an established rule of law is sought to be applied to circumstances to which, as far as the authorities appear to go, it has never been applied before, and when the Court has to determine whether it is to be applied to this new state of circumstances, then I think the Court is entitled to inquire into the principle of the rule, and see whether it comes within the principle or only within the letter of it.

Now, it has been argued that this rule against restraint of marriage is not founded on any principle, that it has nothing to do with public policy, but is a positive rule of law, adopted nobody can tell why, and that because it is a rule of law adopted nobody can tell for what reason, and without any regard to public policy, therefore it is impossible to make an exception to it, and that the Court can do nothing with it but carry it out. I cannot agree with that. It may be, no doubt, that in these modern times we should not for the first time establish such a rule; but of course if a rule has been established as a rule of law because it was thought agreeable to public policy and to the interest of the nation at the time it was established, it may be that the Courts cannot alter it because circumstances have altered, and that this must be done by the Legislature. I am not at all convinced that in ancient times there was anything very irrational in the rule that, as applied to unmarried men and unmarried women, conditions of forfeiture which would prevent their marrying ought to be discouraged. It may well have been considered that such a condition was, to say the least of it, a very arbitrary condition, and contrary to the policy

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of the nation, which was then thinly populated, and the law would not allow it. It does not appear to me that there is anything very absurd in that.

If, then, that was the rule of public policy, we are to consider how that rule applies to second marriages. It has never been decided that it applies to second marriages. All that is said is that out of some of the cases that occurred there probably are some cases in which you cannot tell from the reports whether the person to whom the rule was applied was married or not, and you must not assume on that account that he was not married. At any rate, the question whether there ought to be any such distinction has never been determined. It appears to me very obvious that if it is regarded as a matter of policy, there may be very essential distinctions between a first and second marriage. At any rate, there is this, that in the case of a second marriage, whether of a man or a woman, the person who makes the gift to the man or the woman may have been influenced by their friendship towards the wife in the one case, and towards the husband in the other. That is to say, regarding the case of somebody in the husband's family, he may make a gift to the husband for life, and then make a gift to the wife because she is the wife of that particular husband, and because he thinks it is more for the benefit of the children that the wife should have the money while the children are young rather than that the children should have it. That may very well influence his mind, and therefore he says, If she marries again I wish the children to have it. It was decided by Lord *Hatherley*, in the case of *Newton v. Marsden* (1), for the first time, that not merely a husband but anybody might put that restriction validly on a second marriage of the widow. It appears to me that that was quite as bold a decision as this that we are making, and it is perhaps stronger, because to my mind we must either overrule that decision or carry it to its full extent. I think the cases in reference to a husband are probably likely to be much fewer, that is, cases where the person would be influenced to make a gift to a husband, not because the person making the gift has any peculiar affection for the husband, but because he has a peculiar affection for the wife, and wishes to provide for the

(1) 2 J. & H. 356. *8 June 25 1874.*

wife and the children of the wife, and thinks a gift to the husband is the best mode of carrying out his intention of bounty towards the wife and the wife's children. But such cases will occur, and this obviously is a case of that kind. It is a gift by the testatrix to her adopted daughter; knowing that her adopted daughter had then one child, and probably contemplating that she may have many more, she makes a gift to her adopted daughter, and then to her adopted daughter's husband, and says if the husband marries again it is to go to the children. It seems to me that in no rational way could that ever be considered as against any public policy.

In my opinion, therefore, we are entitled to say that this point, being now raised for the first time, does not come within the principle of the rule which relates to restraints on marriage, although it may come within the letter of the rule as hitherto laid down, and therefore that we ought to hold that the condition in this case is not void.

I do not wish to give my opinion upon the other point, as to whether this was a condition or a limitation.

BAGGALLAY, J.A.:—

I am of the same opinion. The testatrix in this case has directed her trustees to pay the whole income to arise from her estate unto her nephew *Robert Noble Jackson* and *Ellen Ada Jackson*, then his wife, and their assigns, during their joint lives, and after the decease of either of them, then to the survivor for his or her life, with a proviso added, that if *Ellen Ada Jackson* should depart this life in the lifetime of her husband *Robert Noble Jackson* and he should marry again, then she directed her trustees and the survivor of them to stand possessed of the said trust moneys and securities upon certain other trusts. This portion of the will, taken by itself, is clearly a gift to the nephew *Robert* in the event of his being the survivor of himself and wife for life, with a condition imposing that which in terms is a general restraint upon marriage upon a person already married, and therefore in restraint, so far as it operates as a restraint, of second marriage.

Now the present state of the law as regards conditions in

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restraint of the second marriage of a woman is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making the will in favour of his mother. That, I think, is laid down in *Godolphin's Orphan's Legacy* (1). Then came the case before Vice-Chancellor *Wood of Newton v. Marsden* (2), in which it was held to be a general exception by whomsoever the bequest may have been made. Now the only distinction between those cases and the present case is this—that they all had reference to the second marriage of a woman, and this case has reference to the second marriage of a man, but no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a man, and following the analogy of the other cases, there seems no reason at all why a distinction should be drawn between the two sexes as regards this matter. It appears to me that this condition is one which may fairly be treated as valid, and I think so the more for this reason. Here is a gift in favour of a man, which, if he is not deprived of it on the occasion of his second marriage, he may very probably or very possibly settle upon a second wife, and altogether deprive the original family which was the object of the testatrix's bounty.

Upon the second point, whether this provision is to be treated as a condition or a limitation, if the whole will is taken into consideration, and the particular passage which I have read is considered with reference to all that follows, particularly the clause for maintenance and the clause for advancement, I am very much disposed to think it should be treated as a limitation and not as a condition. But it is unnecessary to decide that point.

Solicitors : *Parkers*, agents for *Dalton & Salusbury, Leicester* ;
R. J. Child, agent for *Plumbe, Winchcomb*.

In re BREWER.*Lunatic—Rent-charge—Lands Clauses Act, 1845.*

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Dec. 19.

Lands which were subject to a rent-charge in favour of a lunatic during his life were taken by a corporation acting under the *Lands Clauses Act*. The Court authorized the committee of the lunatic to release the lands from the rent-charge upon the corporation purchasing in the name of the lunatic a Government annuity of the same yearly amount for his life.

BY an indenture dated the 15th of December, 1821, two freehold houses in *Clerkenwell* were charged with the payment of an annuity of £50 for the benefit of *Brewer*, a lunatic, during his life if he should so long continue of unsound mind. These houses, in October, 1875, were sold and conveyed by the owner to the Metropolitan Board of Works, who required them for the purposes of a street improvement, and were partially pulled down. This sale was made subject to the annuity. The Board offered to purchase a Government annuity of £50 for the life of the lunatic as a compensation for his interest in the property. This was agreed to by the committee subject to the approbation of the Court. The committee then presented a petition in the Chancery Division and in Lunacy, praying that the Board might be at liberty to purchase in the name of the lunatic a Government annuity of £50 for his life, and that upon such annuity being purchased, and on payment by the Board of the costs of the application, the committee might be at liberty to release the premises from the annuity. The *Lands Clauses Acts*, 1845 and 1860, were incorporated with the Act of 1872, under which the improvements now in progress were made.

Herbert Smith, for the Petitioner:—

A difficulty has been felt whether, under the *Lands Clauses Act*, what is asked can be done. The case is that of land subject to a rent-charge, which case is provided for by the 115th and following sections; but a release in consideration of a Government annuity does not seem to come within any of the provisions of the Act, the rent-charge under the Acts 8 Vict. c. 18, ss. 10, 11, and 23 & 24 Vict. c. 106, s. 2, being a rent charged on the rates payable under the special Act.

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E. A. Geare, for the Board of Works.

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In re

BREWER.

Dauney, for the next of kin.

JAMES, L.J. :—

This annuity charged on land is a hereditament, and therefore comes within the clause as to the purchase of “lands,” since by the interpretation clause the word “lands” includes hereditaments. I am therefore of opinion that we have jurisdiction to make the order ; for the committee could, with our sanction, sell the annuity to the Board for a sum of money under the Act, and we could in Lunacy direct that sum to be applied in the purchase of a Government annuity. The prayer of the petition may, therefore, be granted.

MELLISH, L.J., concurred.

Solicitors : *W. Compton Smith ; W. Beck ; W. Wyke Smith.*

C. A.

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[1874 A. 86.]

V.-C. H.

July 7.

Will—Life Estate—Estate Tail by Implication—Vested Estate—Executory Devise—Rents undisposed of—Outstanding legal Estate.

C. A.

Nov. 22, 23 ;
Dec. 21.

A testator, by a will dated in 1832, devised lands to *T.* during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son then over. The legal estate in the lands was outstanding. *T.* died leaving an eldest son, a minor :—

Held, by *Hall*, V.C., that the eldest son would, on attaining the age of twenty-one years, take an estate for life, and that the rents and profits in the meantime were undisposed of and went to the heir of the testator :

Held, by the Court of Appeal (reversing the decision of *Hall*, V.C.), that on the death of *T.*, the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one years, with an executory devise over in that event to *T.* in tail.

THOMAS ANDREW, the father, by his will, dated the 29th of October, 1832, devised certain freehold messuages, tenements, and hereditaments and premises in *Lancashire* unto his natural son,

5th D. 993
17th D. 226
18th D. 226

Thomas Andrew, "to have and to hold all and every the said lands, tenements, and hereditaments, with the appurtenances, situate as aforesaid, during his natural life, subject to the payment of the following annuities and mortgage. And from and after his decease I give, devise, and bequeath the said lands, tenements, and hereditaments unto his eldest son lawfully begotten, if he shall have arrived at the age of twenty-one years, or so soon as he shall arrive at that age; and in default of his having a son, then I give and bequeath the same to the eldest son of my natural son *Henry Andrew* for ever." The testator then gave certain life annuities, and bequeathed his residuary personal estate, but made no residuary devise of real estate.

Thomas Andrew, the father, died on the 25th of November, 1843, leaving him surviving, *Thomas Andrew* the son, also *Thomas Andrew* the grandson, the eldest son of *Henry Andrew*, and leaving his brother *George Andrew* his heir-at-law. The legal estate in the devised lands was outstanding in the mortgagee.

Thomas Andrew the son had at the death of *Thomas Andrew* the father no issue, but had afterwards six daughters and a son, the Plaintiff *Charles James Andrew*, who was still a minor.

On the 25th of April, 1868, *Thomas Andrew* the son executed a disentailing deed (duly inrolled), purporting to convey the devised lands to a trustee to the use of *Thomas Andrew* the son, his heirs and assigns.

A suit for the administration of the estate of *Thomas Andrew* the father was instituted by the eldest son, *Charles James Andrew*, who claimed a life estate, or such larger estate as the Court should determine. In opposition to the claim of *Charles James Andrew*, *Amelia Andrew*, widow and devisee of *Thomas Andrew* the son, claimed the estate under the disentailing deed and the will of *Thomas Andrew* the son; and the devisees of *George Andrew* the heir-at-law claimed the rents and profits as undisposed of during the minority of *Charles James Andrew*.

The question was argued before the Vice-Chancellor *Hall* on the 7th of July, 1875.

Dickinson, Q.C., and *Torriano*, for the Plaintiff.

Miller, Q.C., and *Locock Webb*, Q.C., for *Amelia Andrew*.

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Robinson, Q.C., and Bryce, for the son of Henry Andrew.

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V.-C. H.*Eddis, Q.C., Cookson, Q.C., and Jolliffe, for other parties.*

HALL, V.C.:—

The first question I have to determine is whether, under this devise, *Thomas Andrew* took an estate tail in possession. I answer that question in the negative. I consider that *Thomas Andrew* took an estate for life. The estate is expressly given to *Thomas Andrew* to hold during his natural life, and such a devise is not to be interfered with unless for some purpose necessary to effectuate what is the clear intention of the testator.

It is said that, upon the construction of the will, the gift to the eldest son when he shall attain twenty-one, and in default of his having a son, amounts to a disposition to *Thomas Andrew* in tail male, that the words “eldest son,” taken in connection with the words “in default of his having a son,” are equivalent to a limitation to the heirs of the body. But it is a sound and proper rule of construction not to interfere with the express language of a will if effect can be given to it, and, in my opinion, effect can be given to the words “his eldest son” by holding that eldest son to take what apparently is alone given to him, that is to say, an estate for life. I consider it to be settled by the case of *Doe v. Charlton* (1) that where there is a precise gift to one son—the eldest son—you are not to interfere with that express disposition unless there is something which necessitates destroying that express disposition in order to give effect to a general intention. Now, I apprehend that if it be true that in the words “in default of his having a son” there is an intention manifested to give the estate to all the male issue, or all the issue derived from sons of *Thomas Andrew*, the proper way to effectuate that is by giving an estate tail in remainder, preserving the express estates as far as you can, and I consider that to be the rule which is laid down in *Doe v. Gallini* (2). But I expressly guard myself against putting a construction on those words, “in default of his having a son.” That question will arise on the death of the Plaintiff, and not before, because the

(1) 1 Scott, N. R. 290.

(2) 5 B. & Ad. 621; 3 A. & E. 340.

Plaintiff taking for life, the question will hereafter arise, what is to become of the property after his death?

But it is necessary to say what is to become of the rents and profits during the minority of the Plaintiff. Now, the gift under which the Plaintiff claims is to the eldest son, if he shall have arrived at the age of twenty-one, or so soon as he shall arrive at that age. I apprehend, and it has been so treated throughout the argument, that that is not a present vested estate in possession, and I do not see how it could be made to be so. It is not within the line of the authorities, *Bromfield v. Crowder* (1), *Parsons v. Parsons* (2), and cases of that class, because there is here no express gift over on his dying under the prescribed age, which is the ground on which, in that class of cases, the vesting has been held to take place, the gift over being considered a condition subsequent, and not being considered a condition precedent. There is nothing here to enlarge that estate for life by reason of a gift over in case of his death under age.

Then the question is, what is to become of the rents in the meantime? It appears to me that upon that point there is authority which governs the case before the Court. I refer to the case of *Chambers v. Brailsford* (3). It has been argued that these must be held to be legal limitations, with the result that all these dispositions would be void because they are contingent, and that the Act (8 & 9 Vict. c. 106) does not extend to prevent the estate going over if the contingency has not happened at the time when the particular estate is determined. That is perfectly true, and the Act only protects against forfeiture, surrender, and merger; but if there can be no legal contingent remainder, and the estates must from the circumstances and position of the title be merely equitable, I cannot, for the purpose of construction, hold that the estates must be deemed to have been determined so as to give a remainderman something which he was never intended to have, and at law cannot have.

I must, therefore, consider that there is a period of time during which there is no disposition whatever of these rents, which therefore go to the heir. It was said that there is no equity in the

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(1) 1 B. & P. N. R. 313.

(2) 5 Ves. 578.

(3) 18 Ves. 368.

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heir's favour; but he does not require any, as he takes whatever has not been disposed of. It will be found that *Chambers v. Brailsford* (1) is an authority which supports that position; and not only supports it, but as I collect, the argument in favour of the persons to take in remainder was thought to be untenable, and given up. There are other cases which bear more or less on this case, although perhaps they are all distinguishable. They were cases in which the gifts were residuary, and being residuary, they were thought upon the terms to carry along with the corpus of the property the accumulated rents upon the contingency happening. Of that class *Phipps v. Ackers* (2) is one; but here there is no residuary devisee which would have swept in and carried these undisposed of rents.

It only remains for me to mention the case of *In re Mowlem* (3), where the present Master of the Rolls held that the residuary devisees were entitled to the intermediate rents, from the testator's death to the birth of the tenant in tail, but said that if there had been no residuary devise in this will, the heir-at-law would have been entitled to the rents.

It appears to me, therefore, upon authority, that all I can do at present is to declare that the Plaintiff is entitled contingently upon his attaining the age of twenty-one, to the property in question—that he will upon attaining twenty-one be entitled for life. That is a contingent estate, and in the meantime during the contingency of his estate the rents and profits are undisposed of, and belong to the heir-at-law.

C. A. From this decision both *Amelia Andrew* and the Plaintiff appealed, and the appeals now came on to be heard before *James, L.J., Mellish, L.J., Baggallay, J.A., and Brett, J.*

Argument. *Miller, Q.C., and Locock Webb, Q.C., for Amelia Andrew:—*

We say that *Thomas Andrew* the son took an estate for life, with a contingent remainder over to his son, if then of the age of twenty-one years, for life, with remainder to *Thomas Andrew*

(1) 18 Ves. 368.

(2) 9 Cl. & F. 583.

(3) Law Rep. 18 Eq. 9.

the son in tail: *Mellish v. Mellish* (1); *Forsbrook v. Forsbrook* (2); *Parker v. Tootal* (3).

The word "son" is often used as a word of limitation: *Doe v. Garrod* (4); *Doe v. Charlton* (5); *Key v. Key* (6). The fact that the legal estate happened to be outstanding can make no difference in construing this will.

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Dickinson, Q.C., and Langworthy, for the Plaintiff:—

There is no estate tail in *Thomas*, but a gift over after his death to the son. The words must mean eldest son living at the death of his father. At all events the estate tail is only in remainder and by way of executory devise after the gift of the fee to the eldest son. We say, also, that the estate of the son was vested at the death of the father. Something he must take, and it is a fee vested or contingent; we say vested: *Sugden's Real Property* (7); *Bromfield v. Crowder* (8). It is clear that the testator did not mean to die intestate as to these rents, and the Court must decide who takes them. The testator has only provided a gift over in the event of there being no son. We say that the Plaintiff has an estate for life or in fee, with an executory remainder in tail to his father: *Doe v. Nowell* (9); *Randoll v. Doe* (10); *Simmonds v. Cock* (11); his estate in fee being liable, no doubt, to be divested in case of his death under age.

Robinson, Q.C., and Bryce, for the eldest son of Henry Andrew:—

We say there is no estate tail in *Thomas Andrew* the son.

Eddis, Q.C., and Jolliffe, for the devisees of the heir:—

The first gift is to *Thomas* for life, and the gift to the son, whatever it be, is by way of remainder. That remainder is contingent, and a gap has been left which the testator has not filled up; and even if it is an executory devise, the estate is not vested. There is no case in which a gift on the happening of a contingency has

(1) 2 B. & C. 520.

(2) Law Rep. 3 Ch. 93.

(3) 11 H. L. C. 143.

(4) 2 B. & Ad. 87.

(5) 1 Scott, N. R. 290.

(6) 4 D. M. & G. 73.

(7) Page 286.

(8) 1 B. & P. N. R. 313.

(9) 1 M. & S. 327.

(10) 5 Dow. 202.

(11) 29 Beav. 455.

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C. A. been held to vest before the contingency has happened. There
 1875 is nothing in the will to give more than a life estate to the eldest
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 ANDREW      son, nor can the testator have meant to give an estate tail to the  
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 ANDREW.      father: *Parr v. Swindels* (1); *Doe v. Gallini* (2). It is clear that  
 ———      until the contingency happens the estate goes to the heir:  
              *Chambers v. Brailsford* (3); *In re Mowlem* (4).

*Miller*, in reply.

Judgment, C. A.      Dec. 21. JAMES, L.J., now delivered the judgment of the  
 ———      Court:—

The testator in this case had two natural sons, but no legitimate issue. By his will he recognises them as his sons, and evidently intended, so far as by law he could, to treat them as if they were his lawful children, the proper inheritors of his estates, and he accordingly divides the bulk of such estates between them and their families.

The portion of his will which we have to construe is that which relates to his son *Thomas*. [His Lordship then read the words of the will.] His son *Thomas*, up to and at the time of the testator's decease, was unmarried. He afterwards married, and had issue several children, of whom one only was a son, the infant Plaintiff, a child eight years old.

The Vice-Chancellor has held that during the minority of that child the estates are undisposed of, so that the rents go during such minority to the heir-at-law.

From that decision the present appeals have been brought, one by the infant, and one by *Thomas's* widow, claiming under a disentailing deed and a will executed by him.

The case has been very elaborately and ably argued before us. The conclusion which the Vice-Chancellor found himself compelled to arrive at is startling, and is obviously one which the testator could not have intended—which no sane testator could have intended—viz., that during the minority of his son's eldest son, the person especially designated to take the estates, and to be, so

(1) 4 Russ. 283.

(2) 5 B. & Ad. 621; 3 A. & E. 340.

(3) 18 Ves. 368.

(4) Law Rep. 18 Eq. 9.

far as these particular considerable estates are concerned, the head and representative of the family, he should be left penniless, and the estates should go away during that time from the family of his son to the testator's heir-at-law for the time being. But of course intestacy is not a matter of intention, and the heir-at-law claims, not because the testator intended him to take in the particular event, and during the particular period, but because, as he alleges, the testator has not expressed his intention as to that event and as to that period.

The question, then, is whether, on the whole context of the will, there has or has not been such omission of intention, or whether there is such intention expressed or fairly to be implied.

It must be conceded that the words of gift to the son's eldest son, standing alone and unaffected by any preceding or subsequent context, would have been a mere gift of a future contingent interest. But these words do not stand alone. They are preceded by the life estate to *Thomas*, and they are followed by the words "and in default of his having a son (in which the word 'his' must, I apprehend, refer to the tenant for life), I give and bequeath the same to the eldest son of my natural son *Henry* for ever."

Now the words, "in default of his having a son," or words of precisely the same import, have been uniformly held to mean that the estates are not to go over so long as there is any male issue, and that the estates are by necessary implication to go to the male issue in regular course of hereditary descent so long as there should be any left. To effectuate this purpose, an estate tail is by necessary implication deemed to be given to the person whose issue are so to take, so that the limitations would stand thus:—To *Thomas* for life; to *Thomas's* eldest son, if he should have arrived at the age of twenty-one, or on his attaining that age; to *Thomas* in tail male; remainder to *Henry's* eldest son in fee.

There is a long category of cases from very early times down to a very recent decision of the Master of the Rolls, in which the words "if," "when," "so soon as," have been held from the context not really to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent operating as a defeasance of an estate vested. And we should be well warranted by the authorities in so dealing with

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this case, inasmuch as the limitations were plainly intended to make a complete settlement of the property to a man for life, then to that man's eldest son on his attaining the age of twenty-one, with a remainder over to the other descendants (which would necessarily take effect on that son's dying under the prescribed age), with an ultimate remainder over to another branch of the family.

But all doubt and difficulty are in this case removed by the fact that the gift is actually expressed to be what without the express words we should have implied it to be, viz., that the gift is expressed to be "from and after" the death of the tenant for life.

A man cannot have an estate "from the death" if he is not to have it for several years after the death, and possibly not at all; and to construe the words as contingent we should have to strike out the word "from," and that in order to make for the testator a most unreasonable will. But taking the word "from" in its natural meaning, and taking the words apparently contingent to have the meaning which has been given to them in so many cases, the whole thing becomes sensible and intelligible.

Arriving at the conclusion that the estate to the son is a vested estate liable to be divested if he should die under the age of twenty-one, that conclusion will dispose of every question now before us; for an indefinite devise, with a gift over in the event of the devisee dying under the age of twenty-one, must be, on principle and authority, a devise in fee. An estate for life would necessarily determine by death at any time, and it would be absurd to attach to such an estate a defeasance in the event of death under the age of twenty-one.

The limitations, therefore, have to be read thus: "to *Thomas* for life; remainder to *Thomas's* eldest son in fee, with an executory devise in tail to *Thomas*, if that son should die under twenty-one." Putting this construction on the will, it is not necessary to consider Mr. *Miller's* ingenious and able argument that we should make the limitation to *Thomas* in tail, to be implied from the words, "and in default of his having a son," an immediate estate tail subject only to the estate to the son if and when that estate should arise. That argument assumes that the estate to the son did not vest on the father's death. But we hold that it did so vest.

The order of the Vice-Chancellor must be discharged, and in lieu thereof a declaration must be made that on the death of *Thomas*, his son, the infant Plaintiff, took an estate in fee in the lands liable to be divested in the event of his death under the age of twenty-one, and that the executory estate contingent on that event is now vested in the Defendant *Amelia Andrew* in fee under the disentailing deed and the will of *Thomas Andrew*.

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Judgment, C. A.

Solicitors for Plaintiff: *Pitman & Lane*.

Solicitors for Defendants: *Bower & Cotton; Gregory & Co.; Milne, Riddle, & Mellor; F. West*.

# WORTHINGTON v. CURTIS.

[1872 W. 212.]

C. A.  
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*Void Policy*—Policy effected by Father on his Son's Life—Title to Policy Money—14 Geo. 3, c. 48—Advancement.

A father effected a policy in the name and on the life of his son, in which he had no insurable interest, under circumstances which satisfied the Court that he intended it for his own benefit. The son died intestate and the father took out administration to his estate, and the insurance company paid the money assured by the policy to him:—

*Held* (affirming the decision of *Bacon*, V.C.), that although as between the insurer and the company the policy was illegal and void under the 14 Geo. 3, c. 48, yet, as between the father and the estate of the son, the father was entitled to retain the money for his own benefit.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

The principal question in the suit related to the right to a sum of £500, being the money received in respect of a policy of assurance in the *Rock Life Assurance Office* on the life of *George Curtis* the younger, the intestate whose estate was being administered in the suit.

The policy was effected by his father, *George Curtis* the elder, in the year 1862. The circumstances under which this was done were set forth in the father's affidavit. He stated that he was indebted to his son in a sum of £400, being a legacy bequeathed by his aunt, and that, on his offering to pay the sum, his

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son demurred to receive it, on the ground that his father had been at great expense in his education and advancement. The affidavit proceeded as follows:—"It was ultimately arranged between my said son and me that I should pay to him the said sum of £400, and that in consideration of such payment I should at my own cost and for my own benefit effect a policy of assurance on his life for £500; and in consequence of this arrangement I did, in the said month of April, 1862, pay to him the said sum, and soon afterwards I entered into correspondence with the actuary of the *Rock Assurance Company* for a policy of assurance on the life of my said son, and received a letter from him which was in the words and figures following," &c.

This letter was dated the 21st of July, 1862. After making an appointment for the attendance of the son at the office, it contained the following sentence: "I enclose you a proposal on own life, also nominee, should that form be required, and if you will kindly return one of them filled up to me I will apply to his referees, neither of which is required to be of the medical profession."

Mrs. *Curtis*, the wife of *George Curtis* the father, also filed an affidavit, in which she stated that she was present at the conversation between her husband and the intestate respecting the insurance of his life, and confirmed the account given of it by her husband.

The *Rock* office accepted the life of *George Curtis* the son, and the policy was accordingly effected as a policy in favour of the executors and administrators of the son. It was sent direct to the father, and he regularly paid the premiums out of his own money.

*George Curtis* the son died in April, 1871, intestate. The *Rock* office required letters of administration to the son to be taken out. This was accordingly done by his father, and the office then paid the policy money to the father and took his receipt.

The Plaintiffs claimed to be creditors of *George Curtis* the son, and filed the present bill against *George Curtis* the father for the administration of his son's estate. The Chief Clerk allowed their claim for £550.

When the suit came on for further consideration the Vice-

Chancellor held that the policy moneys belonged to the father for his own benefit, and from this decision the Plaintiffs appealed.

The Defendant gave notice that at the hearing of the appeal he should contend, by way of cross-appeal, that the Plaintiffs had not established their debt against the intestate's estate.

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*Jackson*, Q.C., and *Dundas Gardiner*, for the Appellants:—

We contend that the proceeds of this policy belong to the estate of *George Curtis* the son, and not to his father. In the first place, we say that it was from the beginning intended as an advancement for the son. That is the presumption of law in such a case, and here all the probability is on that side. The story about the £400 legacy is evidently an after-thought of the father; its payment could form no consideration for the policy: *Dyer v. Dyer* (1). The payment of the premiums by the father is not sufficient to rebut the presumption of advancement. But, secondly, supposing the father intended the policy for his own benefit, he had no insurable interest in his son's life, and it was void under the 14 Geo. 3, c. 48. It was just that sort of speculation which the statute was intended to prevent. The insurance company might, therefore, have refused to pay the money, but as they have declined to take advantage of the statute, and have paid it to the son's administrator, it ought to be applied as part of the son's estate. It is a mere accident that the father has possession of it; he only holds it as administrator, and must prove his title to it like any other claimant. This he cannot do, because he claims through an illegal transaction: *Wainewright v. Bland* (2).

*Kay*, Q.C., and *Dickens*, for the Defendant *G. Curtis* the father:—

If there had been no question as to the statute, the evidence would have been quite sufficient to prove that there was no intention of advancement. The presumption of advancement cannot exist where there is distinct evidence to rebut it; and here both the father and his wife have sworn to the fact that the policy was effected for the benefit of the father. Then, what difference does the statute make? Granted that the policy was illegal, and that

(1) 1 Wh. & T. L. C. 184, 3rd Ed.

(2) 1 Mood. & Rob. 481.



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the company might have refused to pay the money, how does that affect the right to the money when paid? A trustee cannot resist the claim of his *cestui que trust* to money in his hands, on the ground that the money is the produce of an illegal transaction: *Lindley* on Partnership (1); *Joy v. Campbell* (2). Here the son was a trustee of the policy for his father; and if his administrator had been a stranger, he must have accounted for the money when received to the father, and could not have set up the statute.

With respect to the cross appeal, we say that no sufficient evidence of the debt was produced before the Chief Clerk.

*Jackson*, in reply.

Dec. 21. MELLISH, L.J.:—

This is an appeal from part of an order of Vice-Chancellor *Bacon*, by which he declared the Defendant absolutely entitled to the proceeds of a policy of assurance on the life of *George Curtis* the son, the intestate in the cause. There has been a notice by way of cross-appeal, in which our judgment is asked whether the Appellants, who are creditors of the intestate, have made out their debt. Taking this question first, we are all of opinion that there is no reason for thinking that the Chief Clerk came to a wrong conclusion. He had the books before him, and found that the debt was established; and we see no reason to differ from him.

That being so, the question is, whether a policy of assurance which was effected by the father on the life of his son, and in his son's name, was the son's policy or the policy of the father, who is his administrator, and claims it, not as administrator, but on the ground that he is the person, as between himself and his son, who is entitled to the money.

In the first place, we must consider the question of fact, whether the Defendant has given sufficient evidence that as between himself and his son it was really intended that the policy should be for the benefit of the Defendant. On that point we have the

(1) Page 210.

(2) 1 Sch. & Lef. 328, 339.

Defendant's affidavit that he owed £400 to his son on account of a legacy which the Defendant had received, and that when he offered to pay it to his son his son demurred to receive it, on account of the expense to which his father had been put in his education. The affidavit then proceeds to state that an arrangement was made between them as follows:—[His Lordship read the passage in the affidavit set forth above.] Here he alleges in distinct terms that the policy was effected for his own benefit; and this statement is confirmed by his wife. If the case stood on probability, I should have been of opinion that the father probably intended it for his son's benefit; and that is the presumption of law; but, on the other hand, as it is sworn by the father that he effected the policy on his own account, and this is confirmed by the evidence of his wife, and as for a period of nearly ten years he regularly paid the premiums and kept the policy in his own possession, we think there is no sufficient reason for differing from the conclusions arrived at by the Vice-Chancellor, that as between the father and the son the policy was the property of the father.

It was, however, contended on behalf of the Appellants, that, assuming the policy to be the property of the father, it would follow that it was an illegal policy within the statute 14 Geo. 3, c. 48, because, although it was made in the name of the son, the father, who really effected it for his own benefit, had no insurable interest in his son's life. I agree that even if the story told by the father is true as to the expense to which he had been put in his son's education, that gave him no such interest in his son's life as would support the policy; and I am therefore of opinion that the insurance company would have had a good defence under the Act if an action had been brought against them on the policy. But although the company had sufficient knowledge of the circumstances to call their attention to the question, they acted as insurance companies usually do, and never attempted to set up this defence, and when administration to the son was taken out by the father they paid the money without further dispute to him. The question, then, is, whether the money having been so paid, it is part of the intestate's assets, or belongs to the father.

Now the creditors are claiming under the son, and they can

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They claim through him in the same way as executors or trustees in bankruptcy, and have no greater right than the testator or the bankrupt in ordinary cases. This case, therefore, really depends on the question whether, as between the father and the son, the policy belonged to the one or the other. I think it clearly belonged to the father. One test of this is whether, if the son had brought an action of detinue for the policy against the father, he could have recovered it on the ground that the father had no right to it by reason of the statute of Geo. 3? Clearly not. It did not belong to the son but to the father, who had obtained it from the company, and had paid the premiums out of his own money. Again, if the father had wished to surrender it to the company for a valuable consideration, could the son have interfered to prevent him from carrying the surrender into effect? Could he have brought an action for money had and received to recover the amount paid by the company on such a surrender, or could he have maintained a suit in equity to restrain the transaction from being completed? Clearly not. He had nothing to do with it; both the policy and the value of it belonged to the father.

Then the son dies, and the money becomes payable on the policy. Assuming that a creditor, instead of the father, had taken out administration, could he have maintained an action of detinue against the father for the policy? Certainly not. He would have been in the same position as the son before his death, and the son having no property in the policy his administrator would have had no right to it either. Then, supposing the company chooses voluntarily, and without taking advantage of the statute, to pay the money to the father—I say voluntarily, because neither party could have maintained an action against the company—could the administrator of the son have recovered the money from the father? Clearly not.

In my opinion, therefore, there are two reasons for which the appeal must fail. First, because the statute is a defence for the insurance company only, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the statute did not exist. The contract is only

made void as between the company and the insurer. And, secondly, if that is not so, and if the effect of the statute is that the Court will give no relief to any party because of the illegality of the transaction, in that case the maxim, *melior est conditio possidentis*, must prevail, and the party who has the money must keep it. On both these grounds, but especially on the first, I think the conclusion of the Vice-Chancellor was right, and this appeal must be dismissed with costs.

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JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Appellants: *Travers Smith & Co.*

Solicitors for Respondent: *Paterson, Snow, & Burney.*



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TAYLOR *v.* TAYLOR.

[1873 T. 99.]

TAYLOR *v.* KEILY.

[1874 T. 83.]

*Ex parte* TAYLOR.

*Leases and Sales of Settled Estates Acts—Persons entitled to petition—Tenant for Life—Concurrence of Parties interested—19 & 20 Vict. c. 120, ss. 2, 16; 37 & 38 Vict. c. 33, s. 3.*

10CLD232  
24CLD189  
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An order under the *Leases and Sales of Settled Estates Acts* can only be made upon the petition of a person who is, within the meaning of the Acts, "entitled to the possession or the receipt of the rents and profits" of the settled estate, and if there is no such person, no order can be made.

The Court will not dispense with the concurrence of persons opposing an application under the *Leases and Sales of Settled Estates Acts*, if their number and the value of their interests are nearly equal to those of the persons supporting the application.

*Reversed 3CLD. 145.*

JAMES MOLYNEUX TAYLOR, by his will, dated the 13th of May, 1870, made certain devises and bequests in favour of his wife, *Marianne Taylor*. The will then proceeded as follows:—"And whereas by the indenture of settlement, bearing date on or about the 30th day of August, 1848, made previously to and in contemplation of my marriage with my said wife, *Marianne Taylor*, then *Marianne Crossland*, widow, my share and shares, original and accruing, of and in the net annual rents, interest, and income of the residue of the real and personal estate of *James Taylor*, deceased, my late father, directed by the will of the said *James Taylor*, bearing date on or about the 19th day of May, 1846, to be paid to his five children, myself, *James Molyneux Taylor*, *George Thomas Taylor*, *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, for their natural lives, share and share alike, with benefit of survivorship as to two shares thereof between myself and my said brother the said *George Thomas Taylor*, and as to three shares thereof between my sisters, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, were under and by virtue of the authority and power in that behalf in the said will granted, assured, transferred, and set over to

*And see Re Harris 20MR 715 n*

*William Espivent de la Fillesboisnet* and *John Grady*, their executors, administrators, and assigns, but for and only during the lives and life of the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, and the survivor of them, and no longer upon the trusts for the purposes and subject to the restrictions and limitations in the same indenture expressed and contained of and concerning the same. And whereas the said *George Thomas Taylor* has since departed this life; and whereas the interests comprised in the said indenture of settlement, and subject to the provisions therein for the separate use and benefit of the said *Marianne Taylor*, consist of two fifth shares of the said net annual rents, interest, and income of the said residue of the real and personal estate of the said *James Taylor*, deceased, and the same interests and provisions are liable to wholly cease and determine on the death of the survivor of them, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, in the lifetime of the said *Marianne Taylor*, and the said *Marianne Taylor* would be thereby left without any proper and competent marital provision: And whereas, under and by virtue of the said will of the said *James Taylor*, deceased, I am seised or possessed of, or otherwise absolutely entitled in reversion expectant upon the decease of my said three sisters, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, to the said residue of the said real and personal estate of the said *James Taylor*, deceased, now from and after the decease of the survivor of them, the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, and in case my said wife *Marianne Taylor* shall be then living, I give, devise, and bequeath two undivided equal fifth parts or shares, the whole into five equal parts or shares, being considered as divided of and in the said residue of the said real and personal estate of the said *James Taylor*, deceased, so given, devised, and bequeathed to me by the said will of the said *James Taylor*, deceased, as aforesaid, unto and to the use of *William Hoy* and *Jeremiah Keily*, their heirs, executors, administrators, and assigns, upon trust that they the said *William Hoy* and *Jeremiah Keily*, or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall during the life of the said *Marianne Taylor* receive, perceive, and take the net annual produce, rents, interest, and income of the said two fifth parts or shares of the said residue of

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the said real and personal estate, and pay, apply, and dispose of the same net annual rents, interest, and income, to and for the said *Marianne Taylor*, during her life, and for her separate use," without power of anticipation, "and from and after the decease of the said *Marianne Taylor*, do and shall grant and assign or otherwise convey and assure the said two fifth parts or shares of the said real and personal estate to the person or persons who, under the dispositions of this my will, or any codicil or codicils thereto, shall be entitled to the residue of my real and personal estate." And after bequeathing two annuities and certain pecuniary legacies, which he charged on his residuary real and personal estate, the testator continued as follows:—"I give, devise, and bequeath all the rest, residue, and remainder of my real and personal estate, of what nature or kind soever and wheresoever, subject however as to so much and such part of my said residuary real and personal estate as consists of the said two fifth parts or shares of the residue of the real and personal estate of the said *James Taylor*, deceased, to the trusts, purposes, restrictions, and limitations thereof expressed and contained in the said indenture of settlement of the 30th of August, 1848, and to the testamentary dispositions and provisions of and concerning the same, to take effect on the determination of the said indenture hereinbefore contained, and as to the remaining three fifth parts or shares of the said residue, to the life interests therein of the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, and also subject as to my said residuary real and personal estate to the before-mentioned charge and payment of the said two several annuities and pecuniary legacies unto and to the use of the said *W. Hoy* and *J. Keily*, their heirs, executors, administrators, and assigns, upon trust that they the said *W. Hoy* and *J. Keily*, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, do and shall receive, perceive, and take the annual and other rents, interest, and income of my said residuary real and personal estate (but subject as aforesaid), and after defraying thereout all ground and landlord's rent (if any), and all taxes, charges, and expenses of insurance, repairs, collections, and other necessary outlay, and in case the said *Marianne Taylor* shall be then living, and have survived the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*,



do and shall pay, apply, and dispose of the net annual rents, interest, and income then left, to and for the said *Marianne Taylor* during her life, for her separate use," without power of anticipation, "and in case the said *Marianne Taylor* shall be then dead, and the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, or any two or one of them, shall be living then, do and shall pay the said net annual rents, interest, and income, to the said *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, in equal shares, and if only two of them be living, then to the two in equal shares, and if one only shall be living, then the whole to that one, and from and after the decease of the said *Marianne Taylor*, *Ann Taylor*, *Sophia Taylor*, and *Maria Taylor*, do and shall grant and assign or otherwise convey and assure my said residuary real and personal estate unto and to the use of such person or persons, for such estates or estate, interests or interest, and purposes and purpose, as I may by any codicil or codicils to this my will herein-after nominate, limit, and direct." The will contained no power to grant leases.

The testator made several codicils to his will. By one of these, dated the 1st of January, 1867, he specifically devised certain hereditaments (after the death of his wife *Marianne Taylor*, and after the death of the survivor of the children of his late father) to Lord *Denbigh* and others in fee. By the last of the codicils, dated the 24th of April, 1869, he appointed *James Cuddon* as a trustee in place of *William Hoy*, and he gave further pecuniary legacies, and gave the ultimate residue of his estate to *Jeremiah Keily* absolutely, but in case he should die in the lifetime of the testator's wife or sisters, he gave such residue to his wife and sisters in equal shares, or to the survivor of them. The testator died in April, 1870.

The suit of *Taylor v. Taylor* was instituted to administer the estate of the testator's father, *James Taylor*. The suit of *Taylor v. Keily* was instituted to administer the estate of the testator.

The testator's sisters *Ann*, *Sophia*, and *Maria*, were all dead. *Marianne Taylor* had entered into contracts for granting leases of portions of the real estate comprised in the wills of *James Taylor* and the testator. An application was made in the suit of *Taylor v. Taylor* that the contracts might be approved by the Court and

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leases granted in pursuance thereof, but was refused, as reported (1).

A petition was now presented by *Marianne Taylor* and *James Cuddon* in the suits of *Taylor v. Taylor* and *Taylor v. Keily*, and in the matter of the *Leases and Sales of Settled Estates Acts*, praying that an order might be made vesting in *James Cuddon* power to grant leases of the real and leasehold estates comprised both in the specific devise in favour of Lord *Denbigh* and others and in the residuary devise.

*Jeremiah Keily* refused to concur in the application.

It appeared that Mr. *Keily's* age was forty-three and Mrs. *Taylor's* sixty-one.

*Bagshawe*, Q.C., and *F. Bagshawe*, for the Petitioners, admitted that, having regard to the decision in *Taylor v. Taylor*, they could not contend that Miss *Taylor* was a person entitled to possession or receipt of the rents and profits of the estate; but they submitted that by 19 & 20 Vict. c. 120, s. 2, a general power was conferred on the Court of granting leases of settled estates, which must be exerciseable at the instance of some one; and if Miss *Taylor* was not entitled to present a petition, there was no one in the present case so entitled. They further submitted that it would be obviously beneficial that leasing powers should be granted, and that under these circumstances the Court ought to exercise the discretion vested in it by the Act 37 & 38 Vict. c. 33, s. 3.

*W. W. Karslake*, for Lord *Denbigh* and others, supported the petition so far as it related to the property in which his clients were interested.

*Southgate*, Q.C., and *Ince*, Q.C., for *Keily*, consented to an order so far as related to the property in which Lord *Denbigh* and others were interested.

JESSEL, M.R.:—

The questions which I have to decide are, first, whether Mrs. *Taylor* is a person entitled to present this petition under the

(1) Law Rep. 20 Eq. 297.

*Leases and Sales of Settled Estates Acts*; and secondly, even were she so entitled, is Mr. *Keily* a person with whose concurrence I ought to dispense. The last is a question which arises under the Act of 1874, and both are questions which do not affect Mrs. *Taylor* alone, but are likely to affect other persons in similar positions.

Now the first question depends on the wording of the 2nd and 16th sections of the original Act (19 & 20 Vict. c. 120). The 2nd section of that Act gives a power to the Court of Chancery in *England* (which is now vested in the High Court of Judicature), if it shall deem proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, to authorize leases. That is the material part of that section. The 16th section says: "Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life, or any greater estate, may apply to the Court by petition in a summary way to exercise the powers conferred by this Act." The 17th section provides that, subject to the exception contained in the next section, every application must be made with the concurrence of certain persons. It appears to me that the 16th section, though in form merely enabling, is in fact the only enabling part which entitles the Court to set the Act in motion. When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted. For instance, the 16th section says that the proceeding is to be by petition. It is enabling, I know, in form, that the application may be by petition; but no other process can be adopted. That has been decided on a great variety of Acts where the application has been directed to be by petition, and it has been laid down that that being the mode pointed out by the Act which conferred the jurisdiction, you must exercise the jurisdiction (as the 2nd section of this Act says in terms, though it was not necessary) according to the provisions of the Act. In the same way, when the statute says who is the person to petition, it means that the person or persons so described, and no others, shall be entitled to petition, otherwise any one interested might peti-

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tion under the general principle that when powers are to be exercised by a Court of law any person interested in calling those powers into execution is entitled to come before the Court, and the only reason for putting in such a section is to shew that that is not the meaning of the Legislature, but that the right of calling for the exercise of the powers shall be confined to the persons so described. When we turn from the words, which on this point appear to me perfectly clear, to the reason of the thing, the matter seems to me equally clear. The person who is to put the powers of the Court into motion for a lease or a sale of a settled estate, is naturally the person in the possession of it. It would be a very singular thing for the Legislature to enact that a remote remainderman might harass the person in possession by a petition for sale or leasing of an estate with which he has at that time nothing to do, and I am sure it would be a surprise on the framers of this Act if they were to be told that anybody interested in the estate had a right to petition. But then it is said, assuming that to be so where there is a person coming within the description of the 16th section, still, where there is no such person in existence, there must be somebody to petition. But I do not see why. The 2nd section of the Act is not a general power given to the Court, which must necessarily, therefore, be exerciseable at the instance of some one, but it is a modified power subject to the restrictions and provisions of the Act, and it really comes to no more than this—to put in two sections what is well expressed in the *Lands Clauses Act* in a single section—that the Court may, upon the petition of so and so, make such and such an order, which is the result, as I understand it, of the two sections together. I have already decided that under the peculiar terms of these wills Mrs. *Taylor* is not a person coming within the description of the petitioner mentioned in the 16th section, and it follows, from what I have already stated, that she is not therefore a person entitled to petition under the *Leases and Sales of Settled Estates Acts*, and her petition must fail upon that ground.

A second point was discussed, also a very important point, as to what should be the mode of exercising the discretion given to the Court under the 3rd section of the Act of 1874 (37 & 38 Vict. c. 33). That section enables the Court to dispense with the con-

currence or consent of the persons named in the 17th section of the original Act, "but the Court, in considering the application, shall have regard to the number of persons who concur in or consent to the application and who dissent therefrom," "and to the estates or interests which such persons respectively have, or claim to have, in the estate as to which such application is made." It appears to me that that is a discretion which is to be exercised having regard to two sets of circumstances, which I may describe in a short way, with which we are very familiar under other Acts of Parliament, namely, "number and value." Now, the position of the parties is this: Mrs. *Taylor*, the tenant for life, is a lady of the age of sixty-one years, and she is entitled beneficially for life in substance, though not in form. If she survives a gentleman of the age of forty-three, she will then become entitled beneficially to the whole; if she dies in his lifetime, he will become entitled to the whole. He dissents, and there is no other person interested. The result is, therefore, that there is one on one side and one on the other, and it is a very difficult thing to say, as regards the freehold at all events, who has the greater interest. As regards the leaseholds, some of them are for short terms, having sixteen or seventeen years to run, and no doubt by actuarial valuations the lady would have by far the greater interest. Under such circumstances, if I were satisfied that the Court could exercise its discretion, I do not know where the Court ought to stop. It does not appear to me that the meaning of the new statute was that the Court should decide simply according to its own notion of what would be best to be done with the property. It does appear, as far as I can form an opinion at present as to the grounds on which such jurisdiction should be exercised, that it was only in cases of comparatively unimportant persons—that is to say, unimportant as regards value or interest in the estate—dissenting, that the Court ought to exercise such a power as this, and I should require much further argument to convince me that where the persons were equal in number, and where the values of the interest approach so closely as they do in the present instance, the Court, having regard to the number and value of interest of those who dissented, ought to exercise the discretion given to it by the third section of the Act. My present opinion is that it ought

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not. Therefore, upon both grounds, I shall reject this petition so far as it is a petition under the *Leases and Sales of Settled Estates Acts*.

It appears, however, that there is another property besides that to which I have referred, of smaller value, subject certainly to a prior trust empowering the trustees to expend the rents in repairs of the whole property, given to Mrs. *Taylor* for life, with remainder to Lord *Denbigh* and others, who appear by counsel, and who are willing that there should be a reference to Chambers as to the propriety of granting leases. It appears also that Mr. *Keily*, who is the trustee of this property, and is remotely interested in seeing that it contributes its fair proportion not only to the annuities, as a matter of course, but to the repairs of the property, is willing to consent to such a reference with regard to this property, and therefore I have no hesitation in making that reference, not under the provisions of the *Leases and Sales of Settled Estates Acts*, but under the ordinary jurisdiction of the Court in the suit; and I shall direct the petition to be amended accordingly, dismissing the petition so far as it asks for any reference whatever with regard to the properties of which Mr. *Keily* is contingent remainderman, if I may so express it, and directing a reference to Chambers to inquire as to whether it is proper that any and what leases should be granted on any and what terms with respect to the remainder of the property.

The only remaining point is as to costs. It does not appear to me that Mr. *Keily*, by consenting in Court to this part of the petition, ought in any way to have his right to the costs of appearing to-day diminished. He was not applied to, as I understand, prior to the presentation of the petition to consent to this part only, but was invited to meet a hostile petition to lease this property, in which he was so largely interested, without his consent. I think that I should only be doing justice in making the Petitioner pay her costs of the present petition, but reserving to her the right to recoup herself out of the estate to the extent of the costs which will be incurred with respect to the other property, as to which, of course, there will be some trust fund or other out of which they will ultimately be paid. What I mean is this: so far

as the Petitioner is fairly entitled to the other property, she and everybody else will ultimately get their costs, and to that extent, therefore, she ought not to be primarily liable to pay the costs. I make her pay Mr. *Keily's* costs in the first instance, and then she will get back any share of costs she would be entitled to.

Solicitors: *Harting & Sons; Keily.*

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### MUSKETT v. EATON.

[1875 M. 130.]

*Will—Estate for Life—Remainder, vested subject to be divested or Contingent—Words, “Who shall attain the Age of Twenty-one.”*

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Devise to *C. M.* for life, and in the event of his leaving a son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son and his heirs if he should live to attain twenty-one, with remainder over:—

*Held*, that on the death of *C. M.* his infant son took a vested estate in the devised property subject to be divested if he should die under twenty-one.

The rule in *Festing v. Allen* (1) does not apply to such a case, there being a contrary intention shewn in the words “born or to be born in due time after his decease.”

**LUCY MARTIN**, the testatrix in the cause, by her will, dated the 21st of March, 1866, after appointing her nephew *Charles Muskett*, *Charles Eaton*, and *Charles Thomas Muskett*, her executors, and giving them each a legacy, proceeded as follows:—“I give and devise to *Charles Muskett* the farm and hereditaments called *The Folly* for his life, and in the event of his leaving a lawful son born or to be born in due time after his decease who should live to attain the age of twenty-one years, then I give the same farm and hereditaments unto such son and his heirs if he shall live to attain the age of twenty-one years; but in case my said nephew should die without leaving a son who should live to attain the said age of twenty-one years, then I give the aforesaid hereditaments, after the death of him my said nephew *Charles Muskett*, to *George Muskett Eaton* and his heirs.”

(1) 12 M. & W. 279.

M. R. The testatrix died in 1871.

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*Charles Muskett* entered into possession of the farm and hereditaments called *The Folly*, and died on the 22nd of February, 1875, having made a will and appointed *Charles Eaton*, *John Thomas Muskett*, and *William Muskett Elliot*, executors and trustees thereof, and leaving the Plaintiff, his only son, an infant of the age of six years.

The Plaintiff by his next friend filed his bill against *George Muskett Eaton* and the trustees and executors of *Charles Muskett*, deceased, as Defendants, praying that the true construction of the said will might be declared. The only point calling for a report related to the construction of the above-stated devise.

*Cookson*, Q.C., and *Rawlins*, for the Plaintiff:—

The Plaintiff in this case, as the infant son of *Charles Muskett*, is, under the limitations contained in the will, entitled to a vested estate in the farm called *The Folly*, subject to be divested in the event of his dying under the age of twenty-one years: *Hawkins on Wills* (1).

*Freeling*, for the Defendant *George Muskett Eaton*:—

The devise in this will of the hereditaments in question was not an executory devise, but a contingent remainder in favour of the son of *Charles Muskett* on his attaining the age of twenty-one years. This remainder has failed by reason of the particular estate having determined before the contingency happened.

The rule in such cases was established by the case of *Festing v. Allen* (2), where, under a devise to *M. J. H.* for life, with remainder after her decease to the use of her children who should attain the age of twenty-one years, it was held that *M. J. H.* was tenant for life, with a contingent remainder to such of her children as should attain twenty-one; and that, as the particular estate had determined by the death of *M. J. H.* before any of the children attained that age, the remainder failed. The same rule of construction was followed in *Holmes v. Prescott* (3) and *Edgeworth v. Edgeworth* (4), and *Bull v. Pritchard* (5).

(1) Pages 141, 142.

(2) 12 M. & W. 279.

(3) 12 W. R. 636. 10 Jan 45 507

(4) Law Rep. 4 H. L. 35.

(5) 5 Hare, 567.

The result, therefore, is, that the remainder over in favour of *George Muskett Eaton* takes effect.

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*Rodwell*, for the trustees of the will of *Charles Muskett* :—

I contend that the estates limited in remainder after the life estate of *Charles Muskett* failed, whether in favour of the Plaintiff or of the Defendant *George Muskett Eaton*, by reason of the determination of the particular estates, and therefore that the hereditaments passed under the residuary gift.

JESSEL, M.R. :—

The gift by this will is to *Charles Muskett* for life, “and in the event of his leaving a lawful son born or to be born in due time after his decease who shall live to attain the age of twenty-one years, unto such son and his heirs if he shall live to attain the said age of twenty-one years. But in case my said nephew should die without leaving a son who should live to attain the said age of twenty-one years,” then follows the gift over.

The question is, whether the words “attain the age of twenty-one years” are part of the description of the devisee, so as to bring the case within the rule laid down in *Festing v. Allen* (1), where the gift was, in substance, a gift to “such child of A. as shall attain twenty-one.” But it cannot be so. It is an immediate gift to the son of *Charles Muskett*, with a proviso as to his attaining the age of twenty-one years; because the words are, “a lawful son born or to be born in due time after his decease;” and the testatrix must be taken to have known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he could not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the Plaintiff takes a vested estate subject to be divested in the event of his dying under twenty-one; and I so decide.

Solicitors: *Bolton, Robbins, & Busk*, agents for *Lancelot Lane, Kenninghall*.



M. R.

1875

Nov. 20.

*In re* BROADWOOD'S SETTLED ESTATES.

*Practice—Leases and Sales of Settled Estates Acts—Sale of Settled Estate—  
Payment out of Proceeds—Tenant in Tail—Disentailing Deed.*

The proceeds of sale of a settled estate sold under the *Leases and Sales of Settled Estates Acts* will not be paid out to a tenant in tail under the settlement unless he has executed a disentailing deed.

THIS was a petition for payment out of Court of the proceeds of sale of a settled estate which had been sold under the *Leases and Sales of Settled Estates Acts*. The Petitioner was tenant in tail under the settlement. He had not executed a disentailing deed.

*Phear*, for the Petitioner, submitted that a disentailing deed was unnecessary, referring to *In re Row* (1); *In re Wood's Settled Estates* (2).

The MASTER OF THE ROLLS said that he thought it would be better that a deed should be executed.

Solicitors: *Upton, Johnson, & Co.*

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Dec. 18.

JONES *v.* DANGERFIELD.

[1857 J. 90.]

*Benefice under Sequestration—Liability of Sequestrator for Dilapidations—  
Ecclesiastical Dilapidations Act, 1871 (24 & 35 Vict. c. 43).*

Where a benefice was under sequestration at the death of the incumbent, and after the avoidance the buildings were inspected by the diocesan surveyor, and the bishop made an order pursuant to sect. 34 of the *Ecclesiastical Dilapidations Act, 1871*, stating the cost of the repairs required, and declaring the executors or administrators of the incumbent liable for the same:—

*Held*, upon sect. 53 of the Act, that the sequestrator was not liable for the cost of the repairs, and was not entitled to deduct the same from the profits of the benefice in his hands.

THE benefice of *Brabourne*, with *Monks Horton*, in *Kent*, was under sequestration at the death of the incumbent, the Rev. *James*

(1) Law Rep. 17 Eq. 300.

(2) Law Rep. 20 Eq. 372.

*Brothers*, in October, 1872, for the benefit of such of his creditors as, by an order made in the cause on the 27th of June, 1863, were declared to be entitled to the benefit of a deed of assignment executed by him on the 1st of December, 1851, of which the Defendant, *Abraham Dangerfield*, the sequestrator, was trustee. Shortly after the avoidance, the buildings of the benefice were inspected by the diocesan surveyor, who reported thereon, and on the 18th of March, 1873, the Archbishop of *Canterbury* made an order pursuant to sect. 34 of the *Ecclesiastical Dilapidations Act*, 1871 (34 & 35 Vict. c. 43), stating the repairs needed, and their estimated cost, amounting to £174 18s., for which the executors or administrators of Mr. *Brothers* were declared by the order to be liable. Under an arrangement with the new incumbent, the Rev. *G. Perry*, *Dangerfield* collected the remaining tithes which had become due in the lifetime of Mr. *Brothers*, and paid into Court £650 on account thereof, under an order of the 31st of March, 1875, which provided that the same should not be paid out without notice to *Dangerfield*, who was advised that he was liable to provide for the cost of the repairs out of the proceeds of the benefice coming to his hands as sequestrator.

This was an application by way of adjourned summons on behalf of the creditors under the deed of assignment, asking that *Dangerfield* might be ordered to pay into Court the sum of £139 15s. 3d., being the amount certified to be due from him on passing his final account as sequestrator, with the object of raising the question whether he was liable for the dilapidations.

It was stated that Mr. *Brothers* took the benefit of the *Insolvent Act* in 1853. He died intestate, and administration had not been taken out to his estate, by reason, as was stated, of there being no assets to administer.

*Davey*, Q.C., and *Rigby*, for the Plaintiff, in support of the summons.

*Chitty*, Q.C., and *W. W. Karslake*, for the sequestrator and for Mr. *Perry* :—

We are willing to pay the balance into Court, but the fund ought not to be distributed among the creditors of the late

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incumbent without making provision for the repairs, which must otherwise fall on Mr. *Perry*. Sequestrations are only granted on condition that the sequestrator keeps the buildings in repair, and he is liable for dilapidations: *Hubbard v. Beckford* (1); *Whinfield v. Watkins* (2); *Cripps* on the Laws of the Church and Clergy (3); Mr. Justice *Phillimore* on Ecclesiastical Law (4). It is enacted by sect. 20 of the *Ecclesiastical Dilapidations Act*, 1871, that in the case of a benefice under sequestration the dilapidation moneys shall be a charge upon the moneys received by the sequestrator in respect of the net profits of the benefits in priority to all charges except the stipend of the curate.

*Langley*, for the official assignee of *Brothers*, claimed the balance, if any, of the fund, after payment of the creditors under the deed of assignment.

JESSEL, M.R. :—

The question I have to decide is as to the liability of a sequestrator in respect of the balance in his hands arising from the profits of a sequestrated benefice for dilapidations reported after the death of the incumbent. The sequestration issued many years ago, and remained in force up to the death of the incumbent, in October, 1873. The avoidance occurred subsequently to the commencement of the *Ecclesiastical Dilapidations Act*, 1871, and consequently that Act applies to the case. The law on the subject, whatever it may have been prior to the Act, is remodelled by the Act. Section 53 says that no sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of the Act, and to which the Act shall be applicable, unless the claim for such sum be founded on an order made under the provisions of the Act. Now the Act contains two distinct sets of provisions. The one set, comprising sections 12 to 24, relates to the inspection of buildings at other times than when a benefice is vacant, and the other set, comprising sections 29 to 53, relates to inspection of buildings on a vacancy. It does not appear that any inspection took place of the buildings of this

(1) 1 Hagg. Consist. 307.

(2) 2 Phillim. 1.

(3) Page 322.

(4) Page 1390.

benefice in the lifetime of Mr. *Brothers*; but after his death, that is to say, on the vacancy, an inspection of the buildings did take place, and the Archbishop, according to sect. 34, made an order stating what repairs were required to be done, and their cost, for which the late incumbent's executors or administrators were declared to be liable.

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It appears to me that the provisions of sect. 20, and the other sections of that set, have no bearing on the present case, but that it falls under sect. 36, which casts the liability on the executors or administrators of the late incumbent. The result is, that the sequestrator is under no liability for the repairs. I must make an order in the terms of the summons, as I am of opinion that the sequestrator is not liable for the dilapidations, and is not entitled to have the amount deducted from the profits of the benefice collected by him.

Solicitors for Plaintiff: *Kingsford & Dorman*, agents for *Hallett, Creery, & Furley, Ashford*.

Solicitors for Sequestrator and Rev. G. Perry: *Dangerfield & Blythe*.

Solicitor for Official Assignee: *A. S. Twyford*.

### D'EYN COURT v. GREGORY.

[1861 D. 89.]

*Will—Name and Arms Clause—Use of Surname.*

Under a name and arms proviso requiring a devisee to take the testator's surname:—

*Held*, that adding the testator's surname before his own was not a compliance by the devisee, but that adding the testator's surname after his own was so.

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THIS was a suit for the administration of the trusts of the will of *Gregory Gregory*, dated the 22nd of November, 1848. The testator thereby devised his real estate to trustees upon trust, by sale or mortgage, to raise certain sums therein mentioned, and to



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convey and assure so much thereof as should not be sold, and the equity of redemption of so much thereof as might be mortgaged, to the uses and upon the trusts and subject to the provisions therein-after expressed, being (subject to certain uses for securing certain annuities, and to certain limitations which had failed or were spent) to the use of Sir *Glynne Earle Welby* for life, with remainder to the use of the eldest son of Sir *G. E. Welby* living at the date of the will for life, with remainder to the first and every other son of such eldest son of Sir *G. E. Welby* successively in tail male, with remainders over. And the said testator thereby directed that, in the settlement so to be made as aforesaid of his estates thereby devised, there should be contained a proviso or declaration that every person who by virtue of the limitations thereinbefore directed to be contained in such settlement or of the proviso now in statement should become entitled to the possession or receipt of the rents and profits, or to the first beneficial estate of freehold of and in the same estates, or any part thereof, who should not then be called by the name or use the arms of "*Gregory*," should, within the space of one year next after they should respectively become so entitled as aforesaid, and that the respective husbands of such of the persons becoming entitled as aforesaid as should be females should within one year after their so becoming entitled, or within one year after their respective marriages, in case of their being at that time entitled as aforesaid (as the case might be), assume and take upon himself, herself, or themselves respectively, and use in all deeds, letters, accounts, and other writings wherein or whereto he, she, or they respectively should or might be a party or parties or which they should respectively sign, and upon all other occasions, the surname of "*Gregory*," and assume, and take, and use the arms of "*Gregory*" either alone or quartered with his, her, or their own respective family arms. And also should within the said space of one year apply for and endeavour to obtain an Act of Parliament or a proper license from the Crown to enable him, her, or them respectively, and his, her, or their respective issue inheritable under the limitations thereinbefore directed as aforesaid, to take, use, and bear the said surname and arms of "*Gregory*" conform-

ably to the directions in that his will. And in case any such person or persons, or the husband or husbands of any such person or persons, should neglect or refuse to take and use such surname and arms, and to take such steps as aforesaid for enabling him, her, or them so to do within the said space of one year, conformably to the directions in that his will, or in case any person or persons entitled under that his will to the estates thereinbefore devised in possession, or to the receipt of the rents and profits, or to the first beneficial estate of freehold therein, and using and bearing the name and arms of "*Gregory*," should at any time thereafter discontinue the use of such surname and arms, contrary to that his will, or to the proviso or declaration to be contained in the settlement or settlements thereby directed to be made as aforesaid, then and in every such case the estate and interest of the person or persons who or whose husbands should so neglect or refuse or should so discontinue the use of such surname or arms of and in the said hereditaments thereinbefore directed to be settled as aforesaid, and every part thereof, should cease, determine, and become void, and the said hereditaments should immediately thereupon go over to the person or persons next beneficially entitled thereto in remainder under the limitations thereinbefore contained in such and the same manner as if the person or persons who or whose husbands should so refuse or neglect or should so discontinue the use of such surname or arms, being tenant or tenants for life was or were dead, or being tenant or tenants in tail was or were dead, without issue inheritable to his, her, or their estate tail, charged nevertheless with and subject and without prejudice to any lease or leases which should have been previously created of and in the said hereditaments and premises thereby directed to be settled as aforesaid, or any part or parts thereof, by any person or persons entitled thereto pursuant to and by virtue of the powers in that behalf respectively thereinafter directed to be contained in such settlement or settlements as aforesaid; but his will was that such cesser and determination of the estate for life of such tenant for life as aforesaid should not operate so as to exclude, defeat, or prejudice any of the executory or contingent estates thereinbefore directed to be limited to his, her, or their sons and daughters, or any other person or persons,

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and during the suspense and contingency of such expectant remainder the rents and profits of the said hereditaments which would have belonged to such tenant for life if such cesser and determination had not taken place should be payable unto such person or persons and for such intents and purposes and in such manner as the same would have been payable and applicable for the time being in case such tenant for life had actually been dead, so that immediately from and after such cesser or determination the issue of such tenant for life might have and be entitled to the rents and profits of the said hereditaments thereby directed to be settled during the life of the parent as if such parent were dead, and that in case and whilst there should not be any such issue in existence the person or persons next entitled for the time being to a vested remainder in the said hereditaments should and might have and be entitled to the said rents and profits for his, her, or their proper use and benefit respectively, but without any exclusion of or prejudice to the estate, interest, or right of any such issue afterwards coming into existence, but only till the time of the birth of such issue respectively.

The testator died in 1854.

Sir *Glynnne Earle Welby* duly assumed the surname and arms of *Gregory*. He had seven sons living at the date of the will, of whom the eldest was *William Earle Welby*. He died in August, 1875.

In October, 1875, Sir *William Earle Welby* obtained the royal license to take and use the surname of *Gregory* in addition to and before that of *Welby*, and also to bear the arms of *Gregory* quartered with those of *Welby*; and he now presented a petition praying that it might be declared that he had duly complied with the conditions contained in the will of the testator, and might be let into possession of the estates.

*Chitty*, Q.C., and *Methold*, said that there was no recorded decision as to whether the use of the prescribed surname before that of the person becoming entitled to the estate under the limitations of the will was a sufficient compliance with a name and arms clause framed like the present; but it appeared from a number of

cases collected by the authorities at the *College of Herald's* to have been generally assumed that it would be.

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The MASTER OF THE ROLLS said he was clearly of opinion that the use of the surname of *Gregory* before that of *Welby* was not a sufficient compliance with the conditions contained in the will, and he refused the application.

1876. Jan. 22. The Petitioner, in December, 1875, obtained a royal license to take and use the surname of *Gregory* in addition to and after instead of before that of *Welby*. The petition was amended accordingly, and now came on to be again heard, and an order was made according to the terms of the prayer.

Solicitor: *T. D. Bolton*.

### *In re A SOLICITOR.*

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*Practice—Order to tax—Non-payment of Balance by Solicitor—Attachment—Pending Proceeding—Rules of Court, 1875, Order XLIV., r. 2—Judicature Act, 1873, s. 22.*

Dec. 4.

Under an order to tax made in 1873, a balance was found due from a solicitor in respect of moneys received by him, and ought to have been paid within twenty-one days from the 21st of August, 1875:—

*Held*, that the case was governed by Rules of Court, 1875, Order XLIV., rule 2, and that an attachment for non-payment could not be issued without notice to the solicitor.

*Garling v. Royds* (1) distinguished.

IN May, 1873, the common order was made for taxation of a solicitor's bill, and for an account of moneys received by him on behalf of the client; and the balance found due to or by the solicitor was thereby ordered to be paid by the party liable within twenty-one days after service of the Taxing Master's certificate. On the 7th of August, the Taxing Master made a certificate finding a balance due from the solicitor in respect of

(1) *Ante*, p. 81.

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moneys received by him. The certificate was served on the solicitor on the 21st of August, 1875, but he had failed to pay the balance.

*Stirling* applied *ex parte* that an attachment might issue under Rule 9 of the Chancery Rules, under the *Debtors Act*, 1869, and he cited *Garling v. Royds* (1).

THE MASTER OF THE ROLLS said that the case was governed by the following clause of sect. 22 of the *Judicature Act*, 1873:—"Every judgment, decree, rule, or order, of any Court whose jurisdiction is hereby transferred to the said High Court of Justice, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced . . . by the said High Court of Justice . . . in the same manner as if it had been a judgment, decree, rule, or order of the said High Court." It was here sought to enforce an order of the Court of Chancery which had been duly perfected before the commencement of the Act; that could only be done in the way in which orders of the High Court of Justice were enforced, consequently Order XLIV., rule 2, applied, and notice must be given of the application for the attachment. In *Garling v. Royds* the object was merely to compel the Defendant to put in an answer, that is, to take a particular step in a pending cause in which no final decree had been made; and there the practice of the Court of Chancery was applicable under the concluding words of sect. 22 of the *Judicature Act*, 1873.

Solicitors: *Nickinson, Prall, & Nickinson*.

(1) *Ante*, p. 81.

## MOORE v. CLENCH.

[1874 M. 179.]

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Nov. 16.

*Charity—Lease for Lives by Governors of Hospital—Covenant for Renewal—Statutes 13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 11—Charity Commissioners—Charitable Trusts Amendment Act (18 & 19 Vict. c. 124), s. 29.*

In 1836 the governors or trustees of a hospital had granted a lease of land in the city of *E.* for a term of  $41\frac{1}{2}$  years from a past date, which left forty years and a month from the date of the lease, with a concurrent term of ninety-nine years if *A.*, *B.*, and *C.* should so long live, and they covenanted during the term of forty years and a month to add new lives when any dropped. In 1857, on the death of *A.*, the governors put in a new life. In 1872 *B.* died, and the governors refused to put in another life, the Charity Commissioners having claimed the right to forbid the lease under 18 & 19 Vict. c. 124, s. 29. The lessee thereupon filed his bill against the governors for the specific performance of the covenant for renewal :—

*Held*, that the lease was void under the statutes of *Elizabeth*, and that the covenant could not now be enforced so as to bind the charity estate.

*Seemle*, the Charity Commissioners misconceived their powers under sect. 29 of the *Charitable Trusts Amendment Act*, 1855, in refusing their sanction to the proposed renewal.

BY an indenture of lease dated the 25th of February, 1836, and made between the then governors of the Hospital of *St. John*, in the city of *Exeter* (who were a corporation), of the one part, and the lessee, *Charles Brutton*, of the other part, in consideration of the rent reserved and of the covenants by the lessee (including a covenant to expend not less than £2000 in building five houses on the demised site, which was afterwards performed by the lessee), the governors demised to the lessee a certain field in the city of *Exeter* to hold the same from the 29th of September, 1834, for the term of forty-one years and a half, and for the term of ninety-nine years concurrent with the term of forty-one years and a half while the same should continue, if *W. Dawson*, *H. Hirtzel*, and *E. Woolmer*, or any of them, should so long live; and the governors thereby covenanted with the lessee that during the said term of forty-one years and a half, when any of the lives should happen to die, the governors, their successors and assigns, should, within three months next after application should be made to them for that purpose by the lessee, his executors, administrators, or

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assigns, add and put in another life or lives in the room of the life or lives so dying for the fine or consideration therein mentioned. More than £2000 was laid out by the lessee in building on the land.

In 1854 the lessee died.

In 1856 *Woolmer* died; and by an indenture dated the 12th of November, 1857, the then governors of the hospital purported, in pursuance of the covenant in the lease, to demise to the executors of the original lessee the hereditaments before demised, with the houses built thereon, for the term of ninety-nine years, commencing from the 29th of September, 1834, and concurrent with the former terms if the Princess *Louisa Caroline Alberta* should so long live.

In 1872 *Hirtzel* died, and thereupon the Plaintiff, who was the surviving executor of the said lessee, served a notice in writing upon the then governors of the hospital, requiring them to put in another life in the demised premises in the room of *Hirtzel*. The governors conceived that the approval of the Board of Charity Commissioners was necessary to enable them to do so, and applied to them accordingly, but the Charity Commissioners declined to sanction it, not disputing the validity of the covenant but insisting that no renewed lease could be made without their approval according to sect. 29 of the *Charitable Trusts Amendment Act*, 1855, even in pursuance of a contract existing before the Act.

The governors thereupon declined to put in another life, and in order to try the question raised by the Commissioners, the Plaintiff filed his bill against the governors, praying that they might be decreed specifically to perform the covenant contained in the original lease, and to add or put in another life in the room of *Hirtzel*, deceased.

The governors put in their answer, alleging the said refusal by the Charity Commissioners, and also, for the first time, taking the objection that the lease was void under the statutes 13 Eliz. c. 10 and 14 Eliz. c. 11, and that therefore the covenant for renewal could not be enforced.

*Hemming*, Q.C., and *Horton Smith*, for the Plaintiff:—

The objection raised by the Charity Commissioners to the

renewal of the lease was one which cannot be sustained. The renewed lease in 1857 was granted after the *Charitable Trusts Amendment Act*, 1855, had come into operation, and the consent of the Commissioners was properly not required. That Act provides (sect. 29) that the trustees of a charity cannot "make or grant otherwise than by the express authority of Parliament, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof, in reversion after more than three years of any existing term, or for any term of life, or in consideration of any fine, or for any term of years exceeding twenty-one years." The Charity Commissioners considered that the proposed renewal could not be made at all without their consent. But the proposed renewal was only carrying into effect a previous contract existing before the Act came into operation, by which the charity estate was bound, and the estate which came under the control of the Commissioners by virtue of sect. 29 was only the estate subject to the existing covenant. Nothing beyond that could be called the estate of the charity: *Whitworth v. Gaugain* (1).

As to the objection founded on the statutes of *Elizabeth*, the original lease created two concurrent terms, one for forty years and a month, which was a nullity by reason of the accidental excess of a month; the other for not more than three lives, which was perfectly good. Then there is nothing in the statutes to make the covenant void, and in fact a later statute (18 Eliz. c. 11), which avoids such covenants in the case of ecclesiastical charities only (which this is not), recognises the fact that the earlier statutes did not invalidate covenants such as these. The question, therefore, is not whether a reversionary lease pursuant to the covenant would have been good if granted at the date of the covenant, but whether, at the time when specific performance is sought, a lease pursuant to the covenant would be good under the statutes; and this it clearly would be, as it does not exceed three lives. There are many authorities shewing that where there is a power to lease limited to twenty-one years in possession, or the like, a covenant to grant a twenty-one years' lease at a future time may

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(1) 1 Ph. 728.



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be enforced, though a reversionary lease granted at the date of the covenant would have been bad. *Doe v. Bettison* (1) and *Buller v. Powis* (2) are instances of this. And even where a lease in the terms of a covenant would be excessive under the statutes of *Elizabeth* at the time when the covenant is sought to be enforced, the Court will reject the excess only, and enforce the covenant so far as a lease under it would then be lawful. In *Bettesworth v. Dean of St. Paul's* (3) this was done by the House of Lords, though the covenant was nearly 100 years old.

Then the statutes apply only to certain classes of charities specially liable to abuses; and in the case of hospitals is limited to those vested in a single master or guardian, and have no application to charities vested in corporate governors. In any event the Plaintiff should have his costs if he succeeds on the first point which the bill was filed to raise.

*Chitty*, Q.C., and *G. Daw*, for the Defendants, were not called on.

JESSEL, M.R.:—

This is a very unfortunate case. The facts are as follows:—A lessee, under a lease which is invalid so far as regards anything beyond the three lives, claims to be entitled to a renewal under the covenant entered into by the governors of the hospital. They apply for sanction to the Charity Commissioners, who appear to have utterly misconceived the purport of sect. 29 of the *Charitable Trusts Amendment Act*, 1859, and refused to allow the lease to be renewed. The bill is filed to compel the governors to grant a renewal, on the ground that the construction adopted by the Charity Commissioners was erroneous. An answer is put in by the governors, who take the objection that the covenant for renewal is void at law. I am about to give effect to that objection, and the result will be to dismiss the bill.

Then the question arises, whether it shall be dismissed with costs. In the first place, the Plaintiff must clearly be held liable from the moment the answer was put in, wherein this defence was set up; and, in the second place, the trustees of a charity

(1) 12 East, 305.

(2) 2 Coll. 156.

(3) 1 Bro. P. C. 240.

ought not to be visited with costs because of the misapprehension of the Charity Commissioners as to the construction of a public statute. I think, therefore, that I ought to dismiss the bill with costs.

As regards the case itself, it appears to me to be a very plain one. The lease granted by the governors of the Hospital of *St. John, Exeter*, bears date the 25th of February, 1836. The lease, on the face of it, shews that the parties were aware of the restraining provisions of the statute. It is a lease from the 29th of September, 1834, for the term of forty-one years and a half, which is equal to forty years and a month from the date of the lease, and was intended to be a lease in possession for that term, with a concurrent lease for ninety-nine years if the three lives therein mentioned should so long live, and it contains a covenant by the governors that, during the term of forty-one years and a half, if any of the lives should happen to die, another life should be put in. There is also a covenant by the lessee to lay out £2000 in building.

In 1856, when one of the lives dropped, the *Charitable Trusts Amendment Act*, 1855, was in force. The 29th section of that Act is in these terms: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than by the express authority of Parliament under any Act already passed, or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof, in reversion, after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

I am told that the Charity Commissioners think that under this section you cannot grant a lease at all without their consent, even though the contract to grant such a lease existed before the coming into operation of the Act. This is a confusion of one's ordinary notions of justice, especially when the section contains these words: "otherwise than by the express authority of a Court or Judge of competent jurisdiction . . . or with the approval of the board." Judges do not, as a rule, act capriciously; and sup-

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posing there had been a valid contract under the Act, and money had been paid under that contract, could the Charity Commissioners have refused their approval? It was the duty of the Commissioners to examine the case, and, if the law bound them, to authorize the grant of the lease, and if they felt any doubt, then to refer the matter to a superior judicial authority to decide the point. In this case, if the contract was valid, I think they ought to have sanctioned the lease.

But the objection to the lease is this, that under the disabling statutes of *Elizabeth*, trustees of charities cannot lease land for more than twenty-one years, and cannot lease houses and grounds appertaining to them in towns for more than forty years; this lease, therefore, is too long, for if the covenant to add another life is valid, it would be an equitable lease for more than three lives, and therefore within the very mischief of the statute.

The argument addressed to me was this, that you can sever the covenant from the lease so as to make it a separate covenant, which can be enforced at the expiration of the period for which the lease was granted. But the principle on which you can enforce the specific performance of such a covenant is, that it creates an equitable estate from the time of its execution. The argument, therefore, on which the claim to specific performance rests proves too much, for the equitable estate created by the covenant was created at the date of the original lease, and it was by the terms of the statute too long.

Another argument was, that the words of the statute of 13 Eliz. c. 10 were only "master or guardian of any hospital," and that these did not include the plural so as to apply to governors or trustees. But these words are explained by the 14 Eliz. c. 11, as being equivalent to "person or persons;" besides, nothing turns upon the word "guardian," and it is obvious that if no one guardian could grant the lease, no two guardians could do so. I think, therefore, that the governors are within the statute. This was settled nearly 300 years ago in the *Magdalen College Case* (1), where it was held that the word applied to all hospitals.

The last point was, that the covenant could be enforced when the proper time arrived. It was said that when a trustee, being

(1) 11 Rep. 76 a.

donee of a power of leasing, has entered into a covenant for value to grant a lease in excess of his power, a Court of Equity would when the proper time arrived enforce the exercise of that power so as to bind the estate. But that, as a general proposition, cannot be maintained. You must look at the nature of the power. The cases referred to were those of powers vested in tenants for life who have powers to grant leases in possession. When a bare trustee has power to lease in possession, or, in other words, is prohibited from leasing in reversion, the meaning is, that he shall exercise his discretion in the choice of a tenant when the property falls into possession, and not many years before. In the present case the discretion would have been exercised nearly forty years ago. The principle is, that trustees shall find the best tenant when the time arrives for them so to dispose of the estate.

I am of opinion that such a covenant as this does not come within the terms of the statute, and that the Plaintiff's case wholly fails. I dismiss the bill with costs.

Solicitor for Plaintiff: *J. N. Mason*, agent for *George Hirtzel*, *Exeter*.

Solicitors for Defendants: *Coode, Kingdon, & Cotton*, agents for *Daw & Son*, *Exeter*.

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[1875 E. 77.]

Dec. 16.

*Bill of Sale—Execution Creditor—Possession of Sheriff—Appointment of Receiver nominatim.*

Where, on a motion for a receiver, an order is made that a named person on giving security be appointed receiver, the appointment takes effect from the date of the order; and therefore where, after such an order and before the receiver so appointed perfected his securities, certain execution creditors who had not received notice of the appointment put the sheriff in possession of the goods over which the receiver was appointed:—

*Held*, that immediately on notice being given of the appointment the sheriff ought to have been withdrawn.

*Quod manifestum est per 24 P. 291.*

THIS suit was instituted by bill filed on the 26th of July, 1875, for the purpose of realizing a security consisting in part of an unregistered bill of sale of the trade effects of a printing business.

The Plaintiffs were the acting executors under the will, dated the 31st of January, 1870, of *Frederick Howarth Edwards*, who died on the 17th of December, 1872.

The testator, by a deed of the 1st of July, 1869, sold the business to the Defendant for £8000, together with his interest in the leasehold premises where it was carried on, and the stock-in-trade and effects of the concern; and it was provided that £500 only of the purchase-money should be paid in cash, the rest, with interest, remaining a charge upon the property. By another deed of the same date a debt of £6500 also owing by the Defendant was made a charge upon the property. Neither of these deeds was registered under the *Bills of Sale Act*.

Default was made in payment of the interest on these sums, the bill was filed, and on the 29th of July, 1875, the Plaintiffs, on an affidavit of service of notice, obtained an order which was partly as follows:—

“This Court doth order that *Charles Edward Mason*, of No. 30, *Essex Street, Strand*, in the county of *Middlesex*, public accountant, upon his giving security, be appointed to receive the rents and profits of the leasehold hereditaments in the bill mentioned, and

to collect and get in the debts now due and outstanding, and other assets, property, and effects, belonging to the business in the bill mentioned, and to manage and carry on the said business, and the tenants of the said leasehold premises are to attorn and pay their rents in arrear and growing rents to such receiver.'

"And it is ordered that the Plaintiffs and the Defendant do deliver over to the said *Charles Edward Mason* all the stock-in-trade and effects of the said business, and also all securities in their or either of their hands for such outstanding estate, and all books and papers relating thereto."

"And it is ordered that the said *Charles Edward Mason* do, out of the first moneys to be received in respect of the said rents and debts and effects, pay the ground or other rents and debts due and to become due in respect of the said business."

For twelve months before the institution of the suit *C. E. Mason* had superintended the business on behalf of the Plaintiffs and other creditors, and was accustomed to attend at the business premises for a short time on most days. The Defendant, however, continued ostensibly to carry on the business, and the same course was pursued after the order of the 29th of July, 1875, and no step was taken to give notice to the public or persons dealing with the Defendant of the appointment of the receiver.

On the 4th of August, 1875, the sheriff of *Middlesex*, under a writ of *fi. fa.* issued in an action against the Defendant by *Francis Lesiter Soper* and *Reeves Lovell* for a debt of £419 5s. 3d., seized the plant and business effects, and thereupon the receiver instructed his solicitor to give notice of his claim to the goods to the attorneys of the Plaintiffs in the action, which was done on the following day.

An interpleader summons was then taken out by the sheriff, at the hearing of which *Cleasby*, B., barred the claim of the receiver without prejudice to any application to the Court, on the ground that the claim was an equitable one.

The sheriff remained in possession till the 23rd of August, when he advertised the property for sale. The Plaintiffs thereupon, on the 25th of August, applied to the vacation Judge *ex parte*, and obtained an order restraining the sale extending over the 1st of September, and on the 14th of September the vacation Judge

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made a further order in the presence of all parties directing the sheriff to withdraw, on an undertaking by the Plaintiffs and the sheriff to deal with the property under the direction of the Court.

The receiver completed his securities on the 25th of August, and this fact was certified by the Chief Clerk on the 3rd of September.

The execution creditors now moved that the receiver should be ordered to pay their debt, interest, and costs, out of the moneys of the Plaintiffs or the Defendant in his hands; or in the alternative, that they might be at liberty to enforce their judgment in the action against the Defendant, and that the sheriff might be at liberty to execute the writ of *fi. fa.* against the Defendant in due course of law, without regard to the Plaintiffs' mortgages in the bill mentioned; or, as a third alternative, that the execution creditors might be at liberty to go in and be examined *pro interesse suo*, and that inquiry might be made what interest they had in the goods, chattels, debts, credits, rents, and profits mentioned in the order of the 29th of July.

Glasse, Q.C., and Langley, for the execution creditors:—

An order appointing a receiver is for the benefit of the parties to the suit, and does not prevent a creditor from going on with his action till the receiver is actually in possession: *Defries v. Creed* (1). In the present case the order was prospective only, appointing *Mason* receiver when he should have perfected his securities, which did not take place till after the sheriff was put in. There was, therefore, no possession by the receiver which could interfere with the title of the execution creditor. There was no apparent possession by him, and nothing to shew that any change had taken place in the relative positions of the parties. The order asked for follows that in *Russell v. East Anglian Railway Company* (2). The object of the *Bills of Sale Act* was to make such documents absolutely void if not registered, and even the possession by a broker would not be sufficient to defeat the Act: *Ex parte Lewis* (3); *Ex parte Hooman* (4); *Ex parte Jay* (5).

(1) 34 L. J. (Ch.) 607.

(2) 3 Mac. & G. 104.

(3) Law Rep. 6 Ch. 626.

(4) Ibid. 10 Eq. 63.

(5) Law Rep. 9 Ch. 697.

*Locock Webb*, Q.C., and *Sangster Green*, for the Plaintiff:—

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There are two kinds of orders appointing receivers, one when the Court refers it to Chambers to appoint a receiver, and the other when the person appointed is named in the order. In the former case a further order is required to complete the appointment. In the latter, he is actually appointed at the time, and all that is required to be done in Chambers is to perfect the appointment by completing the securities. If the order of the Court did not appoint *Mason* receiver, another order was necessary; but it would be contrary to the practice of the Court to make a second order: *Seton* on Decrees (1). The moment the sheriff knew of the appointment he ought to have been withdrawn. If *Mason* was in possession in any capacity before his appointment as receiver, it is unnecessary to inquire when he was appointed. The only question could be whether he was properly appointed.

The agreement here is, moreover, not a document within the *Bills of Sale Act*: *Brown v. Bateman* (2).

*Glasse*, in reply:—

In *Brown v. Bateman* there was not even an agreement under seal, and the question in that case was really as to the right to attach goods to land.

The question here is whether there was any possession by the receiver in that character. If he was not in a position to take money he could not receive the rents, because receiving the rents is taking possession. That a receiver is not the officer of the Court till he has completed his recognizances is shewn by *Wickens v. Townshend* (3).

MALINS, V.C.:—

The Plaintiffs in this case were in possession of a bill of sale of the trade effects of a business belonging to the Defendant, and, the interest being in arrear, a bill was filed to realize the security. On the day the bill was filed I gave leave to serve notice of motion

(1) 3rd Ed. p. 1004.

(2) Law Rep. 2 C. P. 272.

(3) 1 Russ. & My. 361.



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for a receiver, and, the Defendant not appearing, the order was taken on an affidavit of service. As the appointment was made upon service, I must take the Defendant as having assented not only to the appointment of a receiver, but to the particular person appointed. It was in effect a consent order.

[His Lordship then read the order, and after referring to the facts above stated, continued:—]

It is agreed that when the receiver is once in possession the goods are put out of the reach of the execution creditor. This was the conclusion arrived at in *Russell v. East Anglian Railway Company* (1) after an argument lasting for nine days. If, therefore, the receiver was in possession as from the date of the order, the execution creditors were in contempt in continuing the possession of the sheriff after notice of the appointment, and must pay the costs of the subsequent proceedings. But it is a circumstance in their favour that they did not know of the appointment at the time they took possession.

As to the question when the receiver could be considered as being in possession, I was for a long time impressed with *Defries v. Creed* (2). But the difference between the two cases is, that in that case the receiver was not, as in the present, named in the order. Sometimes there is a reference to Chambers, and there a contest takes place as to which of several persons should be appointed. Where there is such a reference, a further order is required to complete the appointment. No person is appointed at the time, and there cannot be a receiver till some one is actually appointed such. Now in *Defries v. Creed* the receiver was not even nominated till the 16th of March, and the further order actually making the appointment was not till the 23rd of March, and therefore till the latter date there was no receiver, and the execution creditor having taken possession on the 20th of March, the question was whether he had done wrong in disturbing the possession of the receiver. Vice-Chancellor *Kindersley*, in giving judgment, says (3): "Till Mr. *Hedges* was actually appointed, he was not in possession as receiver; and it appears to me, therefore,

(1) 3 Mac. & G. 104.

(2) 34 L. J. (Ch.) 607.

(3) 34 L. J. (Ch.) 608.

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that the creditor had a full right to proceed to execution;" and he then goes on to refer to the second point in the case by saying: "With respect to the retention of the property after Mr. *Hedges'* appointment on the 23rd of March."

It is clear, therefore, that he decided the case on the fact that there was no appointment of a receiver till the 23rd of March.

If that case had turned on the point which Mr. *Glasse* relied on, that there is no appointment till the receiver gives a satisfactory security, it would apply to the present case. But it would be dangerous to allow it to be said that, when a receiver has been actually appointed by the Court, the appointment does not operate till some time afterwards when he perfects his security. The case may go to shew that it might not be right for a receiver to receive money, at all events without putting it in a place of security. But though not justified in receiving money, he was justified in taking possession of moveable chattels. I am glad to find that the case does not go the length of saying that no receiver can act till he perfects his security.

Now in the present case *Mason* was appointed on the 29th of July. The Defendant was informed of the appointment, and had acquiesced in it and virtually withdrawn from the business. Because, though it is true that there is an affidavit that he was in possession and was performing some acts of ownership, he was not doing anything in derogation of the receivership. For the purpose of taking possession and protecting the business against creditors generally, I think the receiver was in possession, and it was wrong to disturb him; and when the sheriff was informed of the appointment on the 5th of August he ought to have been withdrawn. Though there is no authority exactly in point, I think this view is in accordance with the decision of Vice-Chancellor *Kindersley* in *Defries v. Creed* (1).

I am of opinion that when an individual is named in the order he is entitled to possession as from the date of the order, and is the officer of the Court from that time.

The matter came before Vice-Chancellor *Bacon* in vacation, and I think the result was that the question was to stand over for me

(1) 34 L. J. (Ch.) 607. *1875 MS 360*

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to decide. I consider *Mason* as being in possession from the date of his appointment, and the case of the execution creditors consequently fails, and, as they might have come to the Court instead of taking out the interpleader summons, they must pay the costs.

Solicitors: *Dod & Longstaffe; Wm. Maynard.*

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Dec. 18.

*In re* CORLASS.

*Gift after Life Interest—Class to take—Period of Gestation—Marriage after Death of Life Tenant.*

A testator gave his residuary real and personal estate to trustees on trust to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the other half, to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:—

*Held*, that the children and remoter issue of the son living at his death took together as joint tenants.

One of the son's daughters, who was unmarried at his death, married ten days afterwards, and had a child born six months after her marriage:—

*Held*, that inasmuch as the child, though born within the period of gestation after the son's death, could have had no legitimate existence then, it was not within the class entitled to take.

*JOHN CORLASS*, by his will, dated the 10th of December, 1834, devised and bequeathed his real and personal estate to trustees upon trust to pay his funeral and testamentary expenses and other lawful claims against him, and after payment thereof to lay out the residue as therein mentioned, and to pay the interest, dividends, and proceeds thereof to his wife *Alice* until his son *William* should attain the age of twenty-two years, provided his wife should remain his widow and unmarried up to that time; and when his son attained the age of twenty-two years he directed his trustees to call in one-half the money so invested and pay the same to his son for his absolute use, and pay the interest of the remaining half to his wife so long as she should continue unmarried; and after her death or marriage, which should first

happen after his son should attain the age of twenty-two years, the testator directed such interest and proceeds to be paid to the son during his life, and afterwards to the son's lawful issue.

The testator died on the 23rd of December, 1834. His widow died on the 10th of April, 1845, without having married again. *William Corlass* attained twenty-two in the year 1850, and died on the 11th of April, 1875.

At the death of *William Corlass* there were living three children and one grandchild. One of the daughters, *Alice Susannah*, married *George Deveson* on the 22nd of April, 1875, that is, ten days after the death of *William Corlass*. She had a child, *Alice Maud Deveson*, born on the 24th of October, 1875, and therefore within the period of gestation counting from the death of *William Corlass*.

The one-half of the testator's estate now in question was represented by a sum of £840 1s. 11d., which had been paid into Court.

*Roxburgh*, for a married daughter, her husband, and their infant child born before the death of *William Corlass*, who now petitioned for payment of the fund out of Court:—

The proper construction of the will is that all the children and grandchildren *in esse* at the death of the person interested for life take as joint tenants, and excluding the child of *Alice Susannah*, who was not married at the death of *William Corlass*: *Davenport v. Hanbury* (1).

*W. Fooks*, for a child of *William Corlass* who was without children:—

Lawful issue can only refer to children at all events in the case of a blended fund of real and personal estate, as in the case here. The rule in *Davenport v. Hanbury* does not affect personal estate: *Jordan v. Lowe* (2).

MALINS, V.C.:—There is nothing in the point. The fund goes to all the issue who survive the period of distribution, as joint tenants.

(1) 3 Ves. 257. (2) 6 Beav. 350.

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—

On the question whether Mrs. *Deveson's* child can take as a member of the class of lawful issue of *William Corlass*, the rule as to allowing children to take who are born within the period of gestation after the period of distribution, proceeds upon the assumption that the child sought to be included would, if born when the previous estate ceased, have been capable of taking. It is, in fact, treated as if the birth had actually taken place before the termination of the preceding estate: *Blasson v. Blasson* (1); *Trower v. Butts* (2).

*Yate Lee*, for the child of Mrs. *Deveson*:—

The child was in existence at the death of the tenant for life, as is proved by the fact that the period of gestation had not elapsed before it was born. The Court is not at liberty to make any further inquiry than this, namely, Had Mrs. *Deveson* a lawful child born within the period of gestation? It may be that it would not have been possible to prevent the trustees from distributing the fund if they had wished to do so immediately on the death of *William Corlass*, but even then there would have been a right to follow the fund. *Blasson v. Blasson* is in favour of this view, because it shews that the rule applies whenever the result of not applying it would exclude a child: *Pearce v. Carrington* (3).

*Davenport*, for one of the other parties:—

The case cannot be put higher than that the child must be such as would have taken if actually born when the fund became distributable.

MALINS, V.C.:—

This case is a very curious one, and there is much to be said on both sides of the question which has been raised.

I have put a construction on the words of the will the result of which is that *William Corlass* was tenant for life, and after his death the property became divisible amongst his lawful issue

(1) 2 D. J. & S. 665. 10 June 1855. (2) 1 S. & S. 181.  
(3) Law Rep. 8 Ch. 969.

living at his death, and though all his children and grandchildren took shares, they took them as joint tenants, and a child *en ventre sa mère* at the period of distribution would be treated as being in existence for the purpose of sharing in the fund. That has been the rule ever since *Doe v. Clark* (1).

Now in the present case, when Mrs. *Deveson's* father died she was an unmarried woman but *enceinte*, and she married ten days after the death of her father. That the child is a legitimate child is perfectly clear, and is not disputed. But the question is whether it is to be taken as having been *in esse* so as to take a share under this rule. It is clear that the trustees might have distributed the fund, excluding the child, because they could not be bound to wait to see whether the daughter married. But she did marry ten days afterwards, and within the period of gestation, counting from the death of the father, the child was born.

On the whole, I think it is the safer conclusion to say that the child could not have been contemplated as being lawful issue of *William Corlass* when the fund became distributable. In *Blasson v. Blasson* (2), the lady had a child who, if born within the necessary period previously, would have taken, because she was married at the earlier period. But in this case, if Mrs. *Deveson* had had a child at the period of distribution, it must have been illegitimate, and not an object of the testator's bounty; therefore, though the child was in fact lawful, it was not so for the purpose of applying this rule.

A child to be capable of taking under this rule must be one who was legitimately begotten before the period of distribution.

Solicitors: *Devonshire; Clarke & Son.*

(1) 2 H. Bl. 399.

(2) 2 D. J. & S. 665.

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[1873 P. 81.]

Dec. 20.

*Practice—Judicature Act, 1873, s. 22—Pending Cause—Mode of taking Evidence*  
*—Rules of Court, 1875, Order xxxvii, r. 1.*

Where, in a pending cause, replication was not filed nor notice of motion for decree given before the 2nd of November, 1875, the Court has not the power, except with the consent of the parties, to direct that the evidence should be taken otherwise than *vivâ voce*.

THIS was a suit pending at the beginning of the November sittings, in which replication had not been filed and notice of motion had not been given on or before the 2nd of November, 1875.

It was stated that though none of the affidavits proposed to be used had been actually sworn before the middle of November, the greater part of the expense of preparing them had been incurred before the beginning of that month.

*Dundas Gardiner*, for the Plaintiff, now moved that the evidence might be taken by affidavit, with liberty to cross-examine in Court. He contended that the Court had power to direct a cause to be carried on under the old practice, where that was a convenient course to take. Here there would be a manifest convenience and saving of expense in so directing.

*Crossley*, for the Defendant :—

Order xxxvii., rule 1, provides for the mode in which evidence is to be taken, and the course there prescribed can only be departed from by the consent of all parties. The Defendant does not consent to taking the evidence by affidavit, and the Court has no option as to following the new practice when replication has not been filed nor notice of motion for decree given before the Judicature Acts came into force : *Perkins v. Slater* (1).

MALINS, V.C. :—

The rule has been adopted that where, in suits pending at the

(1) *Ante*, p. 83.

beginning of November, replication had been filed or notice of motion for decree given the parties might proceed to complete the evidence in the old way, but that where neither of these steps had been taken before the Judicature Acts came into force, the evidence must be taken according to the new practice. Now here it is said on one side that the old practice ought to be followed, because affidavits were prepared before this rule was laid down. On the other side it is said that the Court is not at liberty, without the consent of both parties, to depart from the rule.

I am of opinion that, without the consent of the parties to have the evidence taken by affidavit, the new rule must be followed, and all the evidence must be taken *vivâ voce*.

All the circumstances as to the preparation of the affidavits will be taken into consideration at the hearing, and if the Court then thinks it reasonable to allow the costs of the preparation it can do so. I think, moreover, on the whole, that it will be desirable to reserve the costs of this application, and then it will be open to me, if I find it was reasonable, and one which ought to have been acceded to, to order them to be paid by the Defendant.

Solicitors: Le Blanc, Torr, & Taylor; Wooler.

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*At the hearing the Court (H. B. Bacon) held that the refusal to have the evidence taken by affidavit was unreasonable and ordered the defendant to pay the costs of the motion. 22 Ch. D. 586.*



V.-C. B.      *In re* LONDON AND MANCHESTER INDUSTRIAL  
 1875  
 ASSOCIATION.

Dec. 16, 17. *Companies Act, 1862, s. 85—Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61)—Provisional Liquidator—Ex parte Application.*

After the presentation of a petition for winding up a life assurance company, and before answering the inquiry directed by the fiat pursuant to the *Life Assurance Companies Act, 1870, s. 21*, whether a *prima facie* case for entertaining the petition has been established, the Court will not appoint a provisional liquidator on the *ex parte* application of the Petitioner.

Tests of insolvency as applied to a life assurance company considered.

THIS was a motion by special leave on behalf of the *London and Manchester Industrial Assurance Company* to discharge an order of the 7th of December, 1875, obtained *ex parte*, for the appointment of a provisional liquidator in the matter of the winding-up of this company, and it came on together with an adjourned summons to proceed with the inquiry directed by the fiat of the Lord Chancellor's secretary indorsed upon the petition.

The petition, which prayed a winding-up order on the ground of the practical insolvency of the company, was presented by *W. H. Squire*, a holder of 760 shares, a director, and formerly one of the committee of management, and was marked in Vice-Chancellor *Bacon's* branch of the Chancery Division.

The case alleged by the petition was, that, having regard to its contingent and prospective liability under policies and other existing contracts, the company was utterly insolvent and unable to pay its debts and liabilities, and ought to be wound up; that claims in respect of policies were being daily made against the company; that it would be inequitable that under the circumstances the claims first accruing should be paid to the detriment of the general body of persons having claims against the company, and that no payment ought therefore to be made except under the sanction of the Court, and it was desirable that a provisional liquidator should be at once appointed.

This petition was answered on the 6th of December, 1875, by the usual reference to the Vice-Chancellor (*Bacon*) in Chambers

to inquire whether a *prima facie* case within the meaning of the *Life Assurance Companies Act*, 1870, s. 21, was established, and to consider the security for costs to be given pursuant to the same section.

On the 7th of December, upon an *ex parte* application on behalf of the Petitioner, made (owing to the circumstance that Vice-Chancellor *Bacon* was not then sitting) in Vice-Chancellor *Malins'* Division, that Vice-Chancellor made an order appointing Mr. *Cooper* provisional liquidator of the company, on his giving security to be approved by the Judge, with a direction for him to pay all moneys to be received by him into the bank to the credit of the provisional liquidator within seven days after receipt thereof, with power for such provisional liquidator to take possession of and protect the funds and property of the company, but not to distribute the assets until further orders.

Summonses had been taken out by the provisional liquidator to proceed under this order, and by the Petitioner to proceed with the inquiry directed by the fiat indorsed upon the petition.

Vice-Chancellor *Malins*, when the matter was again mentioned to him, had declined to interfere, leaving the question of the appointment of the provisional liquidator to be dealt with in the branch of the Chancery Division for which the petition was marked.

The company now moved by special leave to discharge the order of the 7th of December, 1875, by which the provisional liquidator had been appointed, and leave had been obtained on behalf of the Petitioner for the adjournment into Court, to be heard together with the motion, of the summons to proceed with the fiat.

It appeared that the company was registered in 1869, with a capital of £50,000 in £1 shares, of which £4625 had been subscribed for and fully paid up. According to the last annual return made to the Board of Trade on the 24th of March, 1875, 20,958 policies assuring £136,543 16s. 1d. had been issued, on which weekly premiums of £167 0s. 3¼d. or annual of £8685 11s. 11d. were payable. Endowment policies for short periods, payable in five years, had been issued to the extent of £6689 9s. 4d., the premiums in respect of which amounted to

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£1319 4s. 3d. The assets consisted of £500 on deposit, in the names of two of the directors, in the *London and Joint Stock Bank*, £50 in the *Sheffield Bank*, about £700 in the hands of the agents, £664 due on loans on personal security, £1700 due for outstanding premiums, with office furniture and fittings to the value of £135 12s.

Evidence was given on both sides as to the solvency or insolvency of the company.

On behalf of the company evidence was given by an actuary and others to the effect that, so far from being insolvent, the company was quite able to meet its engagements. It was stated by the manager that no claims by policy-holders were at present unsatisfied; that the rent up to last quarter-day had been paid, and that there was not a single unpaid tradesman's account with the exception of the printers' current account; that the liability upon endowment or short-term policies had been largely extinguished since the return of last March, and that a large margin would remain after providing for future contingencies on policy claims and all expenses of management. It was also stated that the Petitioner, who was a director, had been removed from the committee of management in consequence of his having taken the secretaryship of the *Co-operative Bank, Limited*, the holding of which was considered inconsistent with the discharge of his duties as a member of the committee of management; and that, from a circular recently issued by him, calculated to damage the company, it was plainly shewn that this petition was presented from motives of revenge.

In support of the petition attention was called to the large amount that had been received, and the very small balance carried over last year and now available for claims which might be expected to fall in. Claims on endowment policies were frequently falling due, and the premiums received on these policies had been already spent, and no fund had been set apart for securing payment of the claims in respect of these policies; while the liability on the sick-insurance department amounted to £500 a year, for which there was no adequate provision. Mr. *Palmer*, an actuary, came to the conclusion that the company was undoubtedly insolvent in respect of its assurance and endowment contracts. To be solvent the

company should possess in hand at the very least one-fourth of its premiums paid in respect of its ordinary assurance and sick contracts, and the whole of the endowment premiums. In this state of circumstances, if the company were not at once liquidated, claims that matured early would be discharged out of moneys contributed by those policy-holders who remained in the company, and there would be nothing left to answer their claims.

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ASSOCIATION.

*Jackson, Q.C.*, and *E. S. Ford*, for the company, in support of the motion :—

The order appointing a provisional liquidator immediately after presentation of the petition and before the summons directed by the fiat had been proceeded with, was premature and must be discharged. As a rule a provisional liquidator will not be appointed before the hearing of a winding-up petition, unless the petition is unopposed, or it is clear that a winding-up order must be made: *Cilfoden Benefit Building Society* (1); *Emmerson's Case* (2); *Re Railway Finance Company* (3). And this rule must, *à fortiori*, apply to the case of an insurance company, with respect to the winding-up of which it is provided by the *Life Assurance Companies Act*, 1870 (33 & 34 Vict. c. 61), s. 21, that the Court shall not give a hearing to the petition "until security for costs for such amount as the Judge shall think reasonable shall be given, and until a *prima facie* case shall also be established to the satisfaction of the Judge."

Secondly, on the merits, apart from the legal objection, no *prima facie* case for a winding-up or the appointment of a provisional liquidator has been established. There is not at present a single unsatisfied claim by a policy-holder, nor a single unpaid tradesman's account, with the exception of the printers' current account. There are sufficient funds in the bank and in the hands of the company to meet all current liabilities, while the annual premium income is far more than enough to cover accruing liabilities.

We also say that the Petitioner, as a fully paid-up shareholder, has no equity on which he can ask for a winding-up order; and,

(1) Law Rep. 3 Ch. 462.

(2) Law Rep. 2 Eq. 231.

(3) 14 W. R. 754.



V.-C. B. further, that the petition is not presented in good faith, but from  
 1875 motives of revenge at his dismissal from the committee of manage-  
*In re* ment caused by his accepting office as secretary in another com-  
 LONDON AND pany.  
 MANCHESTER  
 INDUSTRIAL  
 ASSOCIATION.

*Kay, Q.C., and Grosvenor Woods, for the Petitioner:—*

We are not concerned to prove a case of absolute insolvency on the part of the company, the question being simply whether a *primâ facie* case in support of the petition has been established, in which case the appointment of the provisional liquidator, who will collect and preserve the assets for the benefit of all parties until the hearing of the petition, will not be disturbed. Applying the test given by Vice-Chancellor *James* in *In re European Life Assurance Society* (1)—inability to pay debts actually due for which a creditor could claim immediate payment—we say that the company is practically insolvent, as it has no reserve funds, no capital remaining to be called up, and can only, out of current income, meet existing liabilities on policies as they fall due to the injury of the other creditors whose claims are not yet matured: *Reeve v. Parkins* (2).

It is not enough to say that the company is not at this moment actually indebted. The case of a life assurance company differs from that of an ordinary company; and it is expressly provided by 33 & 34 Vict. c. 61, s. 21, that in determining whether or not the company is insolvent “the Court shall take into account its contingent or prospective liability under policies and annuities and other existing contracts.” Suppose a policy for £2000 fell due to-morrow, it could not be met, as it is proved in evidence that, without selling the furniture, the company does not possess more than £850. Having regard to the fact that every shilling of the capital has been called up and is now gone, and that the time of trial—ten years from the formation of the company—when policies first begin to fall in, is only now commencing, is it possible to say that this company is solvent, or that it is to the true interest of the policy-holders that it should be allowed to go on?

We submit, therefore, that a *primâ facie* case of insolvency has

(1) Law Rep. 9 Eq. 122.

(2) 2 Jac. & W. 390.

been shewn, so as to justify the Court in entertaining the petition, and that the appointment of the provisional liquidator ought not to be disturbed.

[They also referred to the *Life Assurance Companies Act*, 1872 (35 & 36 Vict. c. 41).]

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BACON, V.C. :—

The first thing to be considered is the order which was obtained *ex parte*. The matter having been transferred to me, it is competent for me to deal with that order without the chance of its being supposed that I am discharging the order of a Judge of co-ordinate jurisdiction with myself, and I must treat it as if I had myself made that order. The rule of practice enunciated by Lord Romilly in *Emmerson's Case* (1), adopted by the Lords Justices on appeal—*In re Cilfoden Benefit Building Society* (2)—acted upon, as far as I know, ever since, and in several instances confirmed, is one so perfectly just, so reasonable, and so applicable to the subject, that no one can hesitate to say that it ought to be the guide in all like proceedings. The 85th section of the *Companies Act*, 1862, having provided, for the purpose of preventing the present destruction or needless embarrassment of a going company, that a petition may be presented by anybody who has interest enough, shareholder or creditor, the rule is this, that if the application is not assented to by the company, or is opposed, there can be no order made for the appointment of a provisional liquidator; but if it is unopposed the order may be made. How can it be said that that rule has any application to this case? Who could oppose the application when it was made *ex parte*? That very condition, therefore, is not complied with, and it cannot be called an unopposed petition, because the Petitioner gets the order *ex parte*. The persons who were to oppose it were totally unacquainted with what was going on behind their backs; and if that had been brought to my attention, putting myself in the place of Vice-Chancellor Malins, I should have refused to make the order. The law provides against throwing the company into inextricable confusion. The order was altogether wrong, and must be, without hesitation on my part, discharged.

(1) Law Rep. 2 Eq. 236.

(2) Law Rep. 3 Ch. 462.

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*In re*LONDON AND  
MANCHESTER  
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ASSOCIATION.  
—

Upon the other point the case is most abundantly clear. There is no *primâ facie* case of insolvency. How can I undertake to say, in the case of a going business like this, that because at present they have not the means of meeting all the claims that may be brought against them, that they are therefore insolvent? How do I know when any such claim may be made? How do I know how many years may elapse before any claim may be made? How do I know how many new shares will be issued, or what new capital got in? These things must be taken into consideration if the question is, insolvent or not? There are no means of ascertaining that. We have simply this dissatisfied individual, who chooses to say the company is insolvent, because, if a claim were made and satisfied out of such assets as the company possesses, it would be so much the worse for people who came afterwards to make claim. It is perfectly frivolous when the matter comes to be considered, and there is not the shadow of a pretence brought forward to shew that there was any case for presenting the petition.

Another point of the case, on which I do not desire to say more than is necessary, is the position of the Petitioner and his duties towards the company, being a director, as I suppose he is still, although he is discharged from another office, whatever it was, by reason of some quarrel which took place between him and the company. Whether he is right or not, I have not to inquire, but, as one of the affidavits puts it, and it has not been contradicted, it was from motives of revenge only that this petition was presented. The circular speaks for itself, and shews that the endeavour of this Petitioner was to supplant the existing company, and to transfer its business over to another company, of which he and the persons associated with him were to become the managers. A more gross abuse of the practice of this Court I have never seen. I do, without hesitation, discharge the first order, and say that there is no foundation for the petition, and that the Petitioner must pay the costs of all these proceedings.

*Jackson* :—The petition is not now before the Court, and I do not know whether your Lordship can deal with it on the present application.

BACON, V.C.:—I have nothing to do with it, and it never will be before the Court. The statute says the Court shall not give a hearing to the petition.

*Jackson*:—I would rather have it off the file.

BACON, V.C.:—I have nothing to do with it. We have not come to that.

Solicitors: *Merriman, Powell, & Co.; J. Vernon Musgrave.*

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*In re*LONDON AND  
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## BATES v. ELEY.

[1872 B. 1.]

; *Practice—Cross-examination—Account.*

V.-C. B.

1876

*Jan. 20.*

The rule that in cross-examination upon an account, notice of the items to which the cross-examination will be directed must be given to the party bringing in the account, applies to the cross-examination of a party seeking to charge by his account as well as to the case of a merely accounting party.

4480/20

**MOTION** on behalf of the Defendant that the examiner might be ordered to take the cross-examination of the Plaintiff on his affidavits filed in these causes on the 28th of November, 1874, and the 28th of January, 1875.

The Plaintiff, by his bill, prayed relief in respect of certain building transactions in which he had been engaged on behalf of the Defendant at *Beckenham*, in 1869 and 1870, and supplied him with materials, the particulars of which were stated in the account furnished by him to the Defendant.

By the decree it was declared that in taking the account thereby directed the Plaintiff was entitled to receive credit for the price of building materials supplied to the Defendant during 1869 and 1870, without charging any builder's profit thereon.

In proceeding with the account directed by the decree, the Defendant gave notice of his intention to cross-examine the Plaintiff on the account. An appointment was obtained before the examiner (Mr. *Beavan*) for the 6th of May, 1875, and, upon the cross-examination commencing, the Defendant was required by the



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examiner to say on what items he wished to cross-examine the Plaintiff. The Defendant insisted upon his right to cross-examine the Plaintiff on all the various items of the account, but the examiner was of opinion that this would be irregular, and that the Defendant must confine himself to a limited number of specified items. The Defendant thereupon, as he stated, on the spur of the moment, and under pressure of the examiner, selected a certain number of items, on which the cross-examination proceeded. The Plaintiff was then re-examined, and the examination was concluded, a note of the Defendant's objection and the examiner's decision being made on the depositions. The Plaintiff subsequently applied to the Chief Clerk for a summons to compel the full examination of the Plaintiff, and also to the examiner, who persisted in his refusal. An appointment was obtained for the 2nd of December, 1875, and the Plaintiff attended at the office, but the examiner declined to proceed, and stated that he did so on the ground already stated on the depositions, and on the ground that the cross-examination was complete.

*Osler*, in support of the motion :—

The examiner has miscarried in limiting the cross-examination to items which the Defendant was called upon to specify, instead of allowing him to go into the account generally. The cases of *Wormsley v. Sturt* (1) and *In re Lord's Estate* (2) merely decide that when an accounting party is cross-examined upon his account, notice must be given to him of the parts to which the cross-examination will be directed, but the rule does not apply to the cross-examination of a charging party. This distinction is supported by *In re Brampton and Longtown Railway Company* (3), which decides that when a creditor is being cross-examined by the official liquidator, contributories are entitled not only to attend, but also to cross-examine the creditor for the purpose of ascertaining the true grounds on which he claims, and on what grounds the claim can be disputed. We shew that justice will not be done between the parties if the cross-examination is to be limited according to the view taken by the examiner, and unless the Defen-

(1) 22 Beav. 398.

(2) Law Rep. 2 Eq. 605.

(3) Law Rep. 11 Eq. 428.

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dant is at liberty to go through and sift the Plaintiff's books for the purpose of shewing that the charges contained in the account furnished by the Plaintiff are erroneous.

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*Kay*, Q.C., and *W. Fooks*, for the Plaintiff:—

It is a settled and most convenient rule of practice that when the account directed by a decree has been brought into Chambers there cannot be a roving cross-examination on that account. The party bringing in the account is entitled to notice of the points he has to meet, and the particular items to which the cross-examination by the party objecting will be directed must be specified: *Wormsley v. Sturt* (1); *In re Lord's Estate* (2). In *In re Brampton and Longtown Railway Company* (3) notice had been given of the intention to cross-examine upon the affidavit generally. The examiner was therefore quite right in this case in limiting the cross-examination to the items specified by the Defendant, and in not allowing a cross-examination upon the whole account from beginning to end. But, further, the present motion to continue the cross-examination on other items is clearly wrong, as the cross-examination and re-examination of the Plaintiff have been concluded and are at an end.

*Osler*, in reply.

BACON, V.C., said that the cross-examination and re-examination of the Plaintiff were concluded before the examiner on the 6th of May, 1875, and if that were all, it would require a very strong case to induce him to permit the examination to be reopened. It was argued that there was a distinction between the case of an account brought in by an accounting and by a charging party, and that the examiner had miscarried in applying the rule, which limited the cross-examination of an accounting party to the items of which notice had been given, to the case of a party making a charge.

The rule of practice as laid down by the late Master of the Rolls in *Wormsley v. Sturt*, that when an accounting party

(1) 22 Beav. 398.

(2) Law Rep. 2 Eq. 605.

(3) Law Rep. 11 Eq. 428.

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brought in his accounts and the other side was dissatisfied with them, the latter was at liberty to examine the accounting party, but must give notice of the points as to which he was to be examined in order that he might come prepared, was the enunciation of a plain and most reasonable principle directly applicable to the present case, in which the account was brought into Chambers, and proved in the suit, and might have been disputed.

[*Osler* stated that the Defendant had all along disputed the account.]

If it was disputed in Chambers, that made the case still stronger against the Defendant, as he might have prepared himself, and got the information necessary for his cross-examination before going before the examiner. The rule of practice already stated was directly applicable, and if any objection was taken to the account, it ought to have been taken earlier. In *In re Brampton and Longtown Railway Company* (1) what was decided was, that contributories would be allowed to attend and take part in the cross-examination of the person claiming to be a creditor of the company, but that their cross-examination must be confined to matters referred to in the affidavit in support of the claim. It would be altogether contrary to the practice of the Court to allow any such general roving cross-examination to go on. It was impossible to say what limit there would be; the Plaintiff's whole conduct, credibility, and character might be gone into, and all this wide region might be open to an enterprising Defendant who wanted to enter into it. The cases referred to were not confined, as it was sought to confine them, to the examination of accounting parties, but applied to all cross-examinations upon accounts. He did not hold out the slightest encouragement to any application for the same purpose in another form, as it would probably meet with the same fate. The motion must be refused with costs.

Solicitors: *W. Eley; Makinson & Carpenter.*

(1) Law Rep. 11 Eq. 428.

*Ex parte* RECTOR OF GAMSTON.

*Lands Clauses Act, 1845, s. 69—Reinvestment of Purchase-money—Glebe—  
Building Farm-house.*

V.-C. B.

1876

Jan. 22.

20th Dec 1876

Part of a fund in Court, the proceeds of sale of a portion of glebe to a railway company, ordered to be paid to the rector towards recouping past outlay in building a farm-house on the glebe.

## PETITION.

Part of the glebe of the rectory of *Gamston, Notts*, was taken by the *Great Northern Railway Company*; and the purchase-money, having, in the year 1853, been paid into Court, was, by an order of the then Vice-Chancellor *Wood*, dated the 12th of November, 1853, on the petition of the then rector, directed to be invested in consols in the name of the Accountant-General, In the matter of the Special Act, The Account of the Rectors of *Gamston*; and the dividends were ordered to be paid to the rectors until further order. The money so invested was now represented by £1412 5s. 5d. consols.

The present Petitioner, the Rev. *George Nelmes Merrefield*, was instituted to the rectory on the 3rd of January, 1873. Up to that date, no farm-house and no farm buildings had existed on the glebe. The Petitioner erected a farm-house and buildings at an outlay of £1000. Of this sum about £877 was defrayed by the Commissioners of *Queen Anne's Bounty*; and there remained about £123, besides £79 10s. 9d. for architect's commission and other charges, £45 5s. 1d. for surveyor's charges, and £10 8s. 4d. for extra work.

The patron, who was the Bishop of *Manchester*, and the diocesan, the Bishop of *Lincoln*, had consented to the Petitioner receiving £120.

The Petitioner prayed that so much of the fund in Court as would raise £120 might be sold, and the proceeds paid to him, and that the company might pay the costs.

In an affidavit in support, the Petitioner said that the glebe had been previously let to the Duke of *Newcastle*, and farmed with adjoining property by the Duke's tenant; that the want of a farm-



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*Ex parte*  
RECTOR OF  
GAMSTON.

house had caused the removal of the "produce" to the adjoining property, and thereby impoverished the land; and that the yearly rental of the glebe, which before was £221 17s., had risen to £299 11s. since the farm and buildings were built.

*Chapman Barber*, for the Petitioner, referred to *Ex parte Rector of Shipton-under-Wychwood* (1).

BACON, V.C., expressed some doubt as to whether the Court had jurisdiction, but finally, on the authority of the case cited, made the order.

Solicitor: *R. H. Nettleship*.

V.-C. B.

*In re* PETTIT'S ESTATE.

1876  
Jan. 22.

*Bankruptcy—Close of Bankruptcy—Order of Discharge—After-acquired Property—Bankruptcy Act, 1869, ss. 15, 47—Bankruptcy Rules, 1870, rr. 124, 125—Costs of Trustee in Bankruptcy.*

After the close of a bankruptcy, property falling in to the bankrupt belongs to him, and not to the trustee in bankruptcy, although the bankrupt has not obtained an order of discharge.

ADJOURNED SUMMONS.

On the 6th of December, 1872, *Richard Pettit* was adjudicated a bankrupt, and on the 14th of January, 1873, a trustee was appointed.

On the 18th of June, 1873, the bankrupt passed his last examination; and by an order made before four o'clock in the afternoon of the 14th of April, 1874, and filed on the 16th of April following, the bankruptcy was declared to be closed.

On the same 14th of April, but after five o'clock in the afternoon, *R. Pettit's* father, *Walter Pettit*, died, having by will bequeathed to him one-fifth of his (the testator's) residuary estate.

On the 23rd of April, 1874, the trustee in the bankruptcy applied for his release, which, by an order of the 16th of June, 1874, was granted to him.

(1) 19 W. R. 549.

*R. Pettit* had not obtained, nor had he applied for, an order of discharge.

The executor having paid the fund representing *R. Pettit's* share into Court, the Registrar of the Court of Bankruptcy having jurisdiction in the bankruptcy during its continuance, claiming to be the present trustee of the estate and effects of *R. Pettit* (see sect. 83, sub-sect. 3, of the Act, and Rule 124 of the *Bankruptcy Rules*, 1870), on the 23rd of November took out the present summons, which was in effect an application that the fund might be paid to him.

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*In re*  
PETTIT'S  
ESTATE.

*Finlay Knight*, for the present trustee in bankruptcy :—

The claim of the trustee depends on the construction of sect. 15 of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71). Did this property devolve upon *R. Pettit* “during the continuance” of his bankruptcy, the bankruptcy having been closed, but he not having been discharged?

The 47th section enacts that when the whole property of the bankrupt has been realized for the benefit of creditors, the Court, if satisfied, “shall make an order” that the bankruptcy has closed; and Rule 125 of the *Bankruptcy Rules*, 1870, prescribes the duties which devolve on a trustee upon the close of a bankruptcy.

This case is the converse of *Ebbs v. Boulnois* (1).

BACON, V.C. :—

Where a bankruptcy has been closed, and the debtor has not obtained an order of discharge, the creditors have certain remedies still subsisting, which are pointed out by the Act and Rules, but the right to take the debtor's property acquired since the close of the bankruptcy is not one of those remedies.

After the close of a bankruptcy, the bankruptcy exists for certain purposes only. Amongst those purposes is not that of vesting the debtor's after-acquired property in the trustee.

*Daniel Jones*, for *R. Pettit*, asked for the costs of the summons against the trustee, and cited *In re Armston* (2); *United Kingdom Life Assurance Company* (3); *Ex parte Angerstein* (4).

(1) Law Rep. 10 Ch. 479.

(2) 10 Jur. (N.S.) 715.

(3) 34 Beav. 493.

(4) Law Rep. 9 Ch. 479.

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V.-C. B.      *Jason Smith*, for the executors.

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*In re*  
PETTIT'S  
ESTATE.

The VICE-CHANCELLOR said that the cases cited had no application to the present: It would be a monstrous thing if a public officer, acting in discharge of his duty, and failing in an application, solely upon the construction of a difficult Act of Parliament, were ordered to pay the costs of the application. The difficulty in the case had arisen entirely upon the language of the statute. If a trustee provoked litigation, he did so at his peril; but in this instance the trustee had done quite right in bringing the matter under the notice of the Court.

The order would be that the costs of all parties, including the executor's costs of paying the money into Court, should be taxed, and paid out of the fund, and the residue paid to *R. Pettit*.

Solicitors: *Piesse & Son*; *Thomas Frame*; *W. F. Watson*.

*In re* NORWICH AND NORFOLK PROVIDENT PERMANENT BENEFIT BUILDING SOCIETY.

SMITH'S CASE.

V.-C. H.

1875

Nov. 11, 13.

*Permanent Benefit Building Society—"Advanced" or Borrowing Member—Mortgage by, to Society—Subsequent Alteration of Rules—Right to redeem.*

*8 app Cos*  
*247*

A permanent benefit building society, comprising "unadvanced" or investing members, and "advanced" or borrowing members, lent to the advanced members at a premium the sums to which their shares would amount when fully paid up, taking from each of them a mortgage of freehold, copyhold, or leasehold property, to secure the sums advanced and the premiums, with interest thereon respectively. By his mortgage deed each advanced member covenanted to pay to the society, at the times and in manner prescribed by its rules "for the time being," the sums payable periodically, by way of subscription or otherwise, in respect of his shares until (1st) the shares with interest on the amount thereof in advance should be realized, and until (2nd) the premium and interest thereon should be paid, and that in the meantime (except when varied by those presents) all the rules "for the time being" of the society should in respect of the said shares be observed by the member. The proviso for redemption took effect in each case "if the said shares and premium and interest thereon respectively should be duly realized and paid according to the covenant."

*S.*, in the year 1866, obtained, for a premium of £130 10s., an advance of £600, in twenty-four shares of the society of £25 each, and executed a mortgage in this form. The society afterwards, in 1873, passed new rules, one of which provided that advanced members should, before redeeming their securities; pay an additional sum as a contribution towards certain losses sustained by the society, and another of which (Rule I) provided that, so far as the rules of law and equity would permit, the rules then passed should apply to all the members as well present as future, and to all its transactions as well past as future:—

*Held*, that *S.* and the other members who were advanced before the passing of the new rules were, notwithstanding the reference in their covenants to the "rules for the time being," entitled to redeem their securities on payment only of those sums which they were liable to pay according to the rules in existence at the date of their respective contracts:

*Held*, also, that Rule I excluded from the operation of the new rules those members whose contracts would be substantially varied by them.

## ADJOURNED SUMMONS.

The object of this society, as specified in its rules, was "to raise a fund to enable members to build houses, to make investments, to pay off mortgages, or to purchase freehold, copyhold, or leasehold



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 1875  
 SMITH'S CASE.

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properties in the manner provided by 6 & 7 Will. 4, c. 52." Its two principal classes of members were—1, investing or "unadvanced" members; 2, borrowing or "advanced" members. Its shares were £25 each, and the unadvanced members were those who subscribed for a share, and paid for it by monthly or yearly payments of a fixed amount per share, or in one or more sums not exceeding a fixed amount, which payments were "to commence on the admission of each member, and to continue payable until he should have received or become entitled to receive the full amount of his share." The unadvanced members were entitled, after payment of expenses, to be credited out of the profits of the society with compound interest at 4 per cent. on their capital subscription money, and the surplus profits were divided between all the members and added by way of bonus upon their subscriptions. The unadvanced members were entitled to receive their shares whenever their subscriptions, interest, and bonuses amounted to £25, but might, on notice before the shares were completed, withdraw, and obtain the amount paid thereon with interest, but without any bonus. The "advanced" members were those who subscribed for shares in order to obtain an advance out of the funds of the society.

In 1866 the society was governed by rules passed in 1863, which, besides providing as aforesaid, were, so far as material, as follows:—

Rule 15. "Advances—Bidding branch.—When the funds in hand are sufficient for the purpose, the chairman shall offer the same for sale to the members at the monthly meetings in shares or sums of £25 each, and the member bidding the highest price or premium for that sum shall be declared the purchaser thereof, with the option of purchasing another share at the same price, and such member shall be at liberty to transfer his interest therein to any other member. . . . Mortgages: All money advanced to members (including the premiums) shall be secured on mortgage of freehold, copyhold, or leasehold property in the names of the trustees."

Rule 16. "Any member having received his or her share or shares in advance shall (after deducting yearly the subscriptions paid thereon) pay interest on the balance remaining due from

time to time at the rate of 4 per cent. per annum, to commence from the time when the same shall be taken out, and to continue until the whole shall be liquidated, such interest to be paid by monthly instalments of 1s. per month for each share, until the same shall be fully paid.”

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SMITH'S CASE.

Rule 17. “That the payment of the premium which a purchaser shall give for his share, as well as the money advanced, shall be secured to the society by a mortgage deed, such premium to be paid by instalments every month at the rate of 1s. a share, over and above all other payments, until the whole shall be fully paid. . . .”

Rule 19. “Power to redeem mortgaged property.

“Members shall be at liberty at any time to redeem the securities held by the society upon giving one month’s notice thereof to the secretary.”

Rule 21. “Borrowing members: Every member having received his share or shares in advance shall be held as legally discharged from all liabilities as soon as he has by his periodical or other payments (together with his proportion of the bonuses) paid all moneys advanced to or due from him.”

In 1866 *Mr. S. Smith* bid for and obtained, at a premium of £130 10s., an advance of £600 in twenty-four shares of £25 each; and by an indenture of mortgage, dated the 27th of October, 1866, and made between *Smith*, therein termed “the member,” of the one part, and the trustees of the society of the other part, in consideration of £600 “paid to the member in full for twenty-four shares of £25 each, which, on executing these presents, he will have become entitled to receive in advance at the premium of £130 10s.,” *Smith* covenanted with the trustees that he would “pay unto the society at the times and in manner prescribed by its rules for the time being applicable thereto respectively, the several sums of money payable periodically by way of subscription or otherwise in respect of the said several shares until (first) the same shares, together with interest at the rate of £4 per cent. per annum on the amount thereof for the time being in advance, shall be realized and paid respectively, and until (secondly) the said premium, together with interest at the rate aforesaid on the unpaid part thereof for the time being, shall be paid, and that in

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1875 rules for the time being of the society shall in respect of the  
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— Then followed a proviso that in default of performance of the  
covenant, or in case of the bankruptcy or insolvency of the  
member, the amounts unpaid of the shares and premiums should  
become payable in a gross sum with interest ; and a demise by the  
member of certain leaseholds to the trustees in trust for the society,  
subject to a proviso for redemption in the following terms:—“If  
the said shares and premiums, and all interest thereon respectively,  
shall be duly realized and paid according to the covenant in that  
behalf hereinbefore contained, then the premises shall, at the  
request and costs of the person or persons entitled thereto, subject  
only to these presents, be revested in him or them free from all  
incumbrances to be created or suffered by the society.”

Early in the year 1873 the society stopped cash payments, but  
it continued to carry on business to a certain extent, and also to  
sell its shares to investing members.

In March, 1873, the society having sustained losses, the amount  
of which, however, had not then been ascertained, passed new  
rules, by which the existing rules, so far as they were not con-  
sistent with the new rules, were repealed or altered, and in par-  
ticular the conditions on which advanced members were entitled  
to redeem their securities were altered. These rules of March,  
1873, which became binding on the 3rd of April in that year, were,  
so far as material, as follows :—

Rule C. “Members who shall have received their shares in  
advance (in these rules called advanced members) shall be allowed  
to redeem their securities on the following terms:—They shall  
give the secretary one calendar month’s notice. They shall then  
be entitled to a release of their securities on payment, first, of such  
amount as is mentioned in Rule F, and, secondly, such a sum as  
shall be equal to the present value of all future payments dis-  
counted at the rate of 5 per cent. on a calculation to be made by  
the directors of the probable period required for the realization of  
their shares in the ordinary course, such amount to be determined  
by the directors, or if the member shall require it, and be willing  
to pay the fee, by the opinion of their actuary.”

Rule F. "The amounts to be deducted on withdrawal, redemption, or realization, under these rules, shall in each case be such a sum as the directors may consider to be the just share of the member withdrawing, redeeming, or realizing, in the debts and liabilities of the society, including any losses on investments or otherwise, ascertained or reasonably probable at the date of the withdrawal, redemption, or realization. But at each annual general meeting the directors shall declare the amount per share which shall be payable during the following year, and such amount shall be the prescribed rate for that year whatever the result."

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Rule G provided for the application of the deductions under Rule F in providing for the debts and liabilities of the society, and all losses in carrying on the business of the society or otherwise. Rule H, after regulating the future rates of monthly payments by the unadvanced and advanced members respectively, provided that the basis of the calculation on which an alteration of payments should be made, should be an average period for realization of not more than twelve years; that so far as might be, the period of realization for unadvanced shares should be the same as the period of discharge for advanced shares.

Rule I was as follows:—"So far as the rules of law and equity will permit, these rules shall apply to all the members as well present as future, and to all its transactions as well past as future."

The losses of the company turned out, owing to the defalcations of their secretary, to be much larger than had been anticipated. The directors, on the 18th of June, 1874, announced that the company was insolvent, and on the 3rd of July, 1874, an order for winding up the company was made by Vice-Chancellor *Hall*.

On the 29th of October, 1874, Mr. *Smith* applied to the liquidator for an account of what was due to the society on his mortgage, and gave notice of his intention to redeem, when the liquidator required him, prior to the release of his security, to make a payment under Rule F of 1873 towards the losses sustained by the society. Mr. *Smith* disputed his liability to make any contributions towards the losses of the society under Rule F, and took out the present summons, that upon payment by him to the liquidator of certain sums of money, which were in fact those



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due under the Rules of 1863, the liquidator might be ordered to reconvey to him the mortgaged hereditaments.

All the debts of the company due to outside creditors had been paid, the only claims upon its assets were those made by the unadvanced members, and the question was whether, as against such unadvanced members, the advanced members in Mr. *Smith's* position were entitled to redeem their securities without making any contribution under Rule F of 1873 in respect of the losses of the company.

It was a representative case.

*Bristowe*, Q.C., and *Badnall*, for Mr. *Smith*:—

There is no contract on the part of *Smith*, and the advanced members whom he represents, which makes them liable for any losses except those occasioned by their own default in payment. The contract between *Smith* and the society is regulated by the terms of his mortgage deed construed together with the rules in existence at the time of its execution, which are incorporated with it; *Mosley v. Baker* (1); and his rights cannot be prejudicially affected by the rules subsequently passed in 1873.

The true nature of mortgages by advanced members of benefit building societies, and the principles applicable thereto and to the redemption thereof, are shewn by *Ex parte Osborne* (2) and *In re Doncaster Permanent Building Society* (3), which latter case also shews that when the debts of the society are paid the rights of the members *inter se* are the same as if there had been no winding-up at all.

This is not a case in which the rights of third parties are affected, and the question is not whether *Smith* is as a member of the society liable to outside creditors, but one between the advanced members, and the unadvanced members to whom the whole assets of the society belong. Suppose the advanced member does not choose to redeem his mortgaged property, but elects to sit down under his loss, Rule F of 1873 cannot be construed as a rule for adjusting the rights of members *inter se*, nor as imposing any obligation on him to contribute as a member.

(1) 1 H. & T. 301.

(2) Law Rep. 10 Ch. 41.

(3) Law Rep. 3 Eq. 158, 163; *Ibid.* 4 Eq. 579.

The present case is, in fact, met by Rule I of 1873, which shews that the contracts of past members were not intended to be affected in cases where it would be inequitable that the new rules should have that effect. V.-C. H.  
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[They also referred to *Fleming v. Self* (1), *Seagrave v. Pope* (2), and *Farmer v. Smith* (3), as cases in which questions as to the right of mortgaging members to redeem their securities had arisen with regard to terminable benefit building societies.]

*Hastings*, Q.C., and *Bury*, for Mr. *Rackham*, an unadvanced member:—

No person can obtain an advance from this society unless he takes shares; both advanced and unadvanced join the society for the purpose of gain, and both are members. We admit that the advanced member cannot be called upon to pay more than he has contracted to pay, but he may contract to be bound by future rules; and by the terms of his mortgage deed this advanced member has covenanted to pay, at the times and in manner prescribed “by the rules for the time being,” the sums payable periodically in respect of his shares, by way of subscription or otherwise. Thus, future rules are pointed to, and the covenant is, in effect, that until the period of redemption the member will perform all the rules that may come into force before that time. This society stopped payment early in 1873, and the rules which were passed in March of that year required all members to pay a rate towards its losses; and these rules were “the rules for the time being” when *Smith* came to redeem his security. It is true that the rules of 1863 did not require any contribution from an advanced member to meet the losses of the society; but then neither did they require any such contribution from unadvanced members. The rule as to contribution was introduced solely in consequence of the losses. There is no reported benefit society case in which a similar rule as to losses is to be found, and this distinguishes the case from *Mosley v. Baker* (4). The first part of Rule F of 1873 is a rule of principle providing that before the advanced member can redeem he must pay his share of the

(1) 3 D. M. & G. 997.

(2) 1 Ibid. 783.

(3) 4 H. & N. 196.

(4) 1 H. & T. 301.

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losses. The second part is a rule of practice applicable to the society when a going concern, but abrogated by the winding-up order, which is in effect an adjudication of bankruptcy; so that the sum which the liquidator ascertains is substituted for that which, if a going concern, the directors would declare.

On the whole—1. *Smith* is a member, and, as such, bound by the rules of the society for the time being unless he has contracted himself out of them. 2. He has expressly contracted to be bound by them. 3. He is then bound by rule F, and must pay his proportion of the losses.

[HALL, V.C.:—Could the reference to the “rules for the time being” render the mortgagor bound by a rule subsequently passed to the effect, for instance, that no advanced member should be allowed to redeem except upon payment of an additional £20?]

The rule must be a reasonable one, and the new rules apply to all the members alike, and contain nothing unreasonable or oppressive on any class of them. None of the authorities cited apply. In *Ex parte Osborne* (1), *Fleming v. Self* (2), and *In re Doncaster Permanent Building Society* (3), there was no similar rule, and the two former were cases of going concerns. The present is a new case, and the other side must shew that the rule is so unreasonable that it ought not to be enforced.

*Dickinson*, Q.C., and *Cozens-Hardy*, for the liquidator.

HALL, V.C.:—

I cannot hold that these rules and the deed taken together compel Mr. *Smith* and the other persons in his position to make as the price of redemption any payments other than those which they were bound to make according to the contract, construed in connection with the rules of the society in force at the time when the advances were made.

It appears to me that, taking the fair construction of the deed along with the rules which then existed, there was a clear bargain between the society and Mr. *Smith* as an individual member

(1) Law Rep. 10 Ch. 41.

(2) 3 D. M. & G. 997.

(3) Law Rep. 3 Eq. 158.

*John H. 2525*

of it (and there is no doubt that he was a member of the society), that he should pay as the premium for getting [the advance made to him those sums, and those sums only, which he would be liable to pay according to the rules of the society as they then existed. Those sums he did pay, and the society at large, or rather the unadvanced members, into whose pockets in some way or other the payments would go, have had the benefit of them.

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It may be that those sums might be payable at times and in a manner differing, though not substantially varying or departing from the spirit of the contract; but that the contract left Mr. *Smith* exposed to a rule which would impose upon him substantially a larger burthen and a larger payment, although he had ceased to have any share or interest in any profits which might be derived from the continuance of this concern, is something so unreasonable, and so against the spirit of the whole scheme and rules of this society, that I cannot put such a construction upon it. Mr. *Smith* takes out his money at an earlier period, paying more than any body else who has at the time an opportunity to bid will give for the shares. He leaves the rest of the money of the society for those who come afterwards, and especially for the unadvanced members who do not draw out their money but remain until the last, or until it suits their convenience to take out their shares.

That, I think, is the fair and proper construction of the deed taken in connection with the rules. The covenant in the deed is that the covenantor "will pay to the society at the times and in the manner prescribed by its rules for the time being applicable thereto respectively the several sums of money payable periodically by way of subscription or otherwise in respect of the said several shares until"—and it must be remarked that these payments are only to go on "until" a certain time—that is, until first, the shares, together with interest, have been paid, and until, secondly, the premium and interest upon it shall have been paid; and he covenants that "in the meantime," that is to say, until the two sets of payments so provided for, and nothing else, have been made, "except where varied by these presents" (and that is certainly not an exception against him, but one in his favour), "all the rules for the time being of the society shall in respect of the same shares be observed and complied with by the member, his



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heirs, executors, administrators, and assigns." Mr. *Smith* thus says, I will perform all the rules of the society for the time being until I have done two things, *i.e.*, until I have made these payments of the sum advanced with interest, and of the premium and interest. It would be a very strange thing to say that his performing the rules until he has made these payments is to be taken to include his making another payment if it is imposed upon him at any time, until he makes the first two payments. That seems to me to be an unreasonable and unmeaning construction of the contract, and I cannot take it that his bargain was to do anything of the kind. He was not, as I have said, to share in any further advantages; he was substantially withdrawing, although, as he had to pay his subscriptions and to be liable to fines and so forth, nominally remaining a member, and I cannot, on such words as these, impose upon him an additional obligation merely because the rules "for the time being" are spoken of. I do not think that was meant by this reference to them.

Further than that, when we come to the new rules themselves, they must be construed in a reasonable way, and with a regard to that particular clause in Rule I referring to the rules of law and equity. I think that clause must be construed if necessary (though I do not say it is necessary) so as properly to exclude from the operation of those new rules members whose contracts, upon a reasonable and fair construction, would be taken to be substantially varied if the new rules were held to be applicable to them.

Upon the whole, therefore, it seems to me that Mr. *Smith's* right to redemption is not varied by the rules of 1873. There will, accordingly, be a declaration that the advanced members in Mr. *Smith's* position are not required to make any payment under Rule F, with an order to the liquidator to reconvey to them accordingly, and the costs of all parties will be paid out of the estate.

Solicitors: *Sole, Turners, & Knight*, agents for *Miller, Son, & Stevens, Norwich*; *R. J. Child*; *Whites, Renard, & Co.*, agents for *Warner Wright, Norwich*.

## BAKER v. GRAY.

[1874 B. 115.]

*Mortgagor and Mortgagee—Notice—Transfer—Consolidation.*

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Dec. 3.

First mortgage of *Blackacre* to *A.*, followed by subsequent mortgages to other persons of which *A.* had notice. After this, first mortgage by the same mortgagor of *Whiteacre* to *B.* After this, transfer of *A.*'s mortgage to *B.*, the mortgagor joining in the transfer; this transfer being made in pursuance of an agreement under which *B.* had paid off *A.* before the date of *B.*'s mortgage. At the date of this agreement *B.* had notice of the puisne mortgages of *Blackacre* :—

*Held*, that *B.* could not consolidate the mortgages of *Blackacre* and *Whiteacre* as against the puisne mortgagees.

*Vint v. Padget* (1) and *Tassell v. Smith* (2) explained.

ON the 30th of November, 1868, the Defendant *Joseph Gray*, in consideration of £3000 advanced to him by *George Colin Oliver* and three others, jointly, mortgaged to them and their heirs freehold messuages numbered 42, 44, 74, 76, and 78, *Gray's Inn Road*, and 11, *Bell Court, Gray's Inn Road*. Of these houses Nos. 74, 76, and 78 had, in 1865, been registered by *Gray* with an indefeasible title in the Land Registry.

On the 16th of June, 1869, *Joseph Gray*, in consideration of £800 advanced by the two Defendants *Denny*, mortgaged to them the same messuages, and in addition thereto 11A, *Bell Court, Gray's Inn Road*, subject to the mortgage for £3000 and interest. Before taking the mortgage, the *Dennys'* solicitor was informed, in reply to his inquiry of the solicitors of *Oliver* and others, that they had no notice, and were not aware of any incumbrance on the property other than that of the 30th of November, 1868; and the same solicitors, on the 18th of June, 1869, accepted, on their clients' behalf, notice of the *Dennys'* mortgage.

On the 18th of June, 1869, *Joseph Gray*, in consideration of £604 advanced by the Defendant *John Bennett*, mortgaged the same property as mortgaged to the *Dennys*, subject to the mortgage to *Oliver* and others, and also subject to the mortgage to the *Dennys*. Before the execution of the mortgage to *Bennett*, his

(1) 2 De G. &amp; J. 611.

MS. 1122 4/10

(2) 2 De G. &amp; J. 713.

MS. 1090 4/10

13th D 66  
644-8  
14th D 70  
64th Cas  
702-77  
19th D 63

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solicitor was by *Joseph Gray* informed, in reply to his inquiry, that there were no other charges or incumbrances on the property. On the 28th of June, 1869, a notice by *Bennett's* solicitor to the solicitors of *Oliver* and others was acknowledged.

On the 28th of April, 1870, and the 21st of June, 1870, *Gray* executed mortgages to *Poole* and *Hughes* and *Sheppard*, of the *Gray's Inn Road* property. Notice of these mortgages was given to *Oliver* before the transfer of his mortgage.

On the 17th of June, 1872, *Joseph Gray*, being indebted to the Plaintiff *Baker* for moneys advanced, mortgaged five different properties at *Mitcham*, and also No. 52, *Gray's Inn Road*, to secure the repayment of a sum amounting to £4364 13s. 11d. in the aggregate. The deed contained powers of sale, leasing, and to appoint a receiver.

The Plaintiff *Baker's* solicitors were, in reply to letters of the 26th and 28th of March, 1874, informed that the Defendants *Dennys* and *Bennett's* charges still existed with, as regarded the *Dennys'* mortgage, two years' interest due, and with, as regarded *Bennett's* mortgage, interest due from the 18th of June, 1871.

On the 29th of April, 1872, *Joseph Gray* wrote to *Baker*, asking him to pay off the £3000 and all interest and costs which he owed to *Oliver* and others, and agreeing to execute a mortgage of his property at *Mitcham* and in *Gray's Inn Road* to secure all moneys which he might so pay and also such sums as he then owed *Baker*; and added, "Furthermore, I agree to concur in a transfer to you of the property mortgaged to *Oliver* and others, and to give you a charge on my equity of redemption subject to the mortgages to *Denny*, *Bennett*, *Poole* and *Hughes*, and *Sheppard*, to secure all moneys I owe or may owe you."

On the 1st of May, 1872, the Plaintiff *Baker* accordingly paid to *Oliver* and his co-mortgagees the amount due on their mortgage.

On the 1st of July, 1872, the Plaintiff *Baker* took a transfer of the mortgage of the 30th of November, 1868, in which *Gray* joined.

This was a bill by *Baker* for accounts, and a declaration that he was entitled to consolidate his two mortgages, and that the Defendants were not, nor any of them, entitled to redeem any of the property comprised in either of the deeds of November, 1868, and

June, 1872, without first paying him what should be found due on both deeds, and in default of payment, foreclosure.

The mortgage of November, 1868, was on the 2nd of December, 1868, placed on the registry, and the transfer to the Plaintiff was also registered on the 11th of November, 1872. The mortgage to *Sheppard* was also on the registry soon after its date, and before *Baker* had acquired any interest.

*Dickinson*, Q.C., and *Kekewich*, for the Plaintiff, contended that he was entitled to consolidate his mortgages, and that the fact of his having had notice of the subsequent mortgages of the *Gray's Inn Road* property made, according to the equitable doctrine, no difference. The decision in *Vint v. Padget* (1) carried the Plaintiff the whole length which he desired to go, as the rule of the Court was unaffected by the fact that the first mortgagee had notice of the second mortgage—that rule being that the second mortgagee took his security with the risk that consolidation might be applied. The decision in *Tassell v. Smith* (2) was strongly in favour of the Plaintiff's contention, though there the question of notice did not arise. They also cited *Beevor v. Luck* (3) and *Pease v. Jackson* (4).

*W. Pearson*, Q.C., and *Stock*, for the Defendants the *Dennys*, and the Defendant *Bennett*, second and third mortgagees, submitted that this was an attempt to carry the doctrine of consolidation of mortgages to a greater extent than had ever yet been established. The notice given by these Defendants to the first mortgagees converted them into trustees for the subsequent mortgagees.

[HALL, V.C. :—That is a strong proposition.]

The letter of the 29th of April, 1872, shewed that it was intended by the mortgagor that the Plaintiff should take the transfer subject to the subsequent mortgages, and that the Plaintiff clearly agreed to do so; therefore he not only had notice of the existing mortgages, but, about three years after they were effected, took the transfer of the first mortgage subject to the rights of the mortgagees. Amongst the documents handed over to the Plain-

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(1) 2 De G. & J. 611. *4 Sm 125122* (3) Law Rep. 4 Eq. 537.  
(2) Ibid. 713. *4 Sm 1090* (4) Ibid. 3 Ch. 576.



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tiff were the notices which had been given to the first mortgagees. The right of consolidation went as far as the right to tack, and no further, and there could be no tacking in this case.

They referred to *Mumford v. Stohwasser* (1).

*Begg*, for the Defendants *Sheppard* and his assignees, referred to 25 & 26 Vict. c. 53, ss. 20, 74, and submitted that the registration of the *Gray's Inn Road* property would alone prevent consolidation in this case.

*Northmore Lawrence*, for the Defendants *Gray*, and *Edwards*, the transferee of *Poole* and *Hughes*.

*Kekewich*, in reply.

HALL, V.C. :—

*60 App Cas 116* The question which has been argued in this case is an important one. Although I had no reason to doubt the diligence of counsel who assured me that no direct authority could be found, I have myself looked through the books to see if I could find any authority. The history of the law of consolidation of mortgages is very remarkable. Lord *Northington* and Lord *Hardwicke* refused to recognise as law what is, and has been, the law in the ordinary case. Lord *Hardwicke* afterwards changed his mind, and it has now been long settled that in an ordinary case consolidation of mortgages is allowed as against the mortgagor, and also as against a subsequent mortgagee of one of the estates. This is allowed, although the first mortgages be not made to the same mortgagee, if by transfer both or all of them come into the hands of the same mortgagee. The law has been so settled, but Judges have doubted whether this was defensible on principle. It has been stated that the doctrine depends upon an equity arising out of the right of the mortgagee to say to the person who comes to redeem, "If you want to redeem, you must do equity." That doctrine is simple enough where the person who wishes to redeem is the mortgagor himself. To him the mortgagee may say, "You seek to pay me off one mortgage, but I have another debt against you secured upon another estate, and instead of compelling me to resort to my remedies in respect of such other debt, pay off both

(1) Law Rep. 18 Eq. 556.

mortgages, otherwise you shall not redeem one." That is intelligible; but when the rights of other persons intervene, it must be seen whether it is or not reasonable to apply this as against them. It has been contended that it is reasonable as against them, because they, when they took their mortgages, took them with the knowledge that there was a possibility of two mortgages coming into the hands of the same mortgagee. There has, however, been no case decided on that principle applied to the case of a mortgage non-existing at the time when the second mortgage was created, and I decline, in the absence of such a precedent, to apply the rule of consolidation to such a case. The person who takes a second mortgage is said to do so subject to the risk of two mortgages coming into the same hands, and that risk has been described as having reference to "prior" mortgages, *i.e.*, prior to the second mortgage. Lord Justice *Knight Bruce*, in *Vint v. Padget* (1), said: the only question "on which Mr. *Lee* has addressed the Court is as to the materiality of notice of a second mortgage to a transferee of 'prior' mortgages." That was all that the Lord Justice dealt with, and that case certainly does not go to the extent to which I am now asked to go. The case of *Tassell v. Smith* (2) has been referred to as 'a case where the mortgage, which was consolidated with the prior mortgage, was subsequent in date to the second mortgage. The second mortgagee resisted consolidation, as he had no means of inquiring about that which was non-existing. If the decision in that case had proceeded simply upon the ground that no distinction could be made between the cases by reason of one of the two mortgages being subsequent in date, I should have been bound by it; but it did not. It was thought necessary on applying the law of consolidation in that case that the Court should take into account what was referred to by Lord Justice *Turner* in his judgment, when he said, "The fire office, when dealing with *Randall* in 1856, must be supposed to have dealt with him on the footing of the law as to tacking, and they had not any notice of *Seager & Co.*'s mortgage. How do you affect their conscience?" The holders of the first mortgage on one property and of the second mortgage on another property, having no notice of another mortgage on one of the properties at the time when the

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14 Ch D 703

(1) 2 De G. & J. 611. 4 Jan 1858 (2) 2 De G. & J. 713. 4 Jan 1858

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first or second mortgage was taken by them, took without notice of any equitable charge, and they said they knew nothing of any other person than the mortgagor who was interested in the two properties; and also that he could not take away either property from them without redeeming both. In such a state of things it was not necessary for Lord Justice *Turner* to refer to the question of notice at all, if consolidation would take place whether there was notice or not. Lord Justice *Knight Bruce*, at the end of his judgment, pointedly referred to the fact of the security being taken by the subsequent mortgagees under such circumstances—*i.e.*, they took their security with notice of the first mortgage—but he did not refer to the fact that they did not give notice to the first mortgagees. Though he did not refer to that fact, and though he thought apparently that the case depended upon the general rule, I am satisfied that Lord Justice *Turner* was, in his judgment, influenced by that fact; and that being so, I do not consider that I can treat that case as governing the present. That case can well stand without my extending the doctrine of consolidation to this case, and I decline so to extend it, bearing in mind the principle laid down by Vice-Chancellor *Wood* in *Beever v. Luck* (1), where he referred to *Vint v. Padget* (2), and said: “The real point seems to be this, as far as it is possible to apply reasoning to a rule which is somewhat difficult to reconcile altogether with sound principles: Whenever the right to redemption is passed over to another person by the original mortgagor, whether he sells the whole property or passes it by way of mortgage only—in either one case or the other, he passes it over subject to the same equities as against the purchaser or mortgagee to which he himself was subject.” Vice-Chancellor *Wood* in that case considered the law to be based upon the capacity of the party to make an inquiry and to learn the real state of things. I think that the doctrine of consolidation of mortgages has gone quite far enough. Therefore there will be a right to consolidate as against the Defendant *Gray*, but not as against the subsequent mortgagees. There must be the usual accounts and a decree for redemption by the Defendants the *Dennys* and others, on payment by them of the principal and interest due on the mortgages of the

(1) Law Rep. 4 Eq. 546.

(2) 2 De G. &amp; J. 611. 4/11/82

premises comprised in their securities, and of so much of the costs of the suit as relates to the mortgages on such premises; and in default of payment foreclosure. There must also be the usual decree for redemption by the Defendant *Gray*, on payment of the whole sum found due on both properties and of the entire costs of the suit; and in default of payment foreclosure.

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Solicitors: *Walters & Gush; Poole & Hughes; N. Bennett; Duffield & Bruty.*

### *In re* CLARK'S TRUST.

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*Friendly Society, Bequest in Aid of its Funds—Residuary Bequest—Charity.*

Dec. 17, 21.

A friendly society is not a charitable institution, and therefore the doctrine of *cy-près* will not, on the society being voluntarily dissolved, be applied to a bequest made to it in aid of its funds, but the same will fall into the testator's residuary estate.

## PETITION.

*William Clark*, by will, in April, 1833, republished in December, 1836, bequeathed all his personal estate (excepting a certain part of it) unto trustees named, upon trust to convert into money and to pay thereout certain legacies, and after giving several charitable legacies, the testator bequeathed as follows:—"I give the sum of £500 sterling further part of my residuary personal estate to be laid out and kept invested in some or one of the public stocks or funds of *Great Britain* in the names of such persons as shall be nominated from time to time to be trustees thereof by the friendly society called the *Ringwood Friendly Society*, lately held at the *Red Lion Inn*, but now held at the *Crown Inn* in *Ringwood* aforesaid, upon trust to apply the dividends and income thereof in aid of the funds of the said society." After making some other bequests upon trust for other friendly societies, and other charitable bequests, the testator disposed of the surplus of his residuary personal estate in favour of his wife.

The testator died in December, 1841. The sum of £500 was duly appropriated to answer the legacy, and it was paid to the trustees for the time being of the *Ringwood Friendly Society*.



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On the 23rd of April, 1867, the legacy was represented by a sum of £477 9s. 1d. £3 per Cent. Annuities, which was standing in the name of the three trustees of that society; and on that day they transferred that sum into the names of the official trustees of charitable funds upon trust for the *Ringwood Friendly Society*.

In August, 1874, the society was duly dissolved by agreement authorized by the 18 & 19 Vict. c. 63, s. 13, and it ceased to exist. No claim was made on the trust fund by the society or by any trustee or member of it.

The widow of the testator, who died in March, 1849, by will in 1843 gave all the residue of her estate unto her son and daughter, their heirs, executors, and administrators, to be equally divided between them as tenants in common, and appointed them executor and executrix of her will. The son died in 1857, and the Petitioner was his legal personal representative.

The daughter died in July, 1866, and the Petitioner was also her legal personal representative.

Upon the dissolution of the society the Petitioner applied to the Charity Commissioners for the transfer of the fund to him as such legal personal representative, and they, after stating that it seemed to them doubtful whether or not the fund was impressed with a trust for charitable purposes generally, and that the question must be decided by the Court of Chancery, transferred the fund into the names of Messrs. *Dyer* and *Veal*, the two survivors of the trustees who had transferred the fund to them, and they transferred it into Court, less certain costs. The fund was now represented by a sum of £431 5s. 2d. £3 per Cent. Annuities, and the Petitioner prayed that, after payment of the costs of the petition, the residue of the fund might be transferred to him.

The particular object of the society is sufficiently referred to in the judgment.

*Phillpotts*, for the Petitioner, contended that the bequest was not for general charitable purposes, but was in aid of the funds of a particular and private club, or private charity, and that the Petitioner was entitled to it. He referred to *Clark v. Taylor* (1), *Russell v. Kellett* (2), *Corbyn v. French* (3), and *Cherry v. Mott* (4).

(1) 1 Drew. 642.

(2) 3 Sm. &amp; Giff. 264.

(3) 4 Ves. 418.

(4) 1 My. &amp; Cr. 123.

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*Rigby*, for the Attorney-General, submitted that the society was founded for charitable purposes, and that as it had been dissolved, the bequest, which was given to a public charity and not to any particular individual, must be applied *cy-près*, as in *Hayter v. Trego* (1). In *Russell v. Kellett* (2) the legatees were non-existing bodies.

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[HALL, V.C.:—That was a very special case].

The judgment has not met with approval. *Clark v. Taylor* (3) was the case of a private charity.

[The VICE-CHANCELLOR asked whether it was admitted that this gift was charitable.

*Phillpotts* replied No: the rules had just been put into his hands. They were not in evidence, and he had not read them, but it seemed that the objects were not charitable, though it appeared that the fund was paid to the Commissioners as being impressed with a charitable trust.]

The cases cited on behalf of the Petitioner stand alone, and are altogether distinguishable from *Reeve v. Attorney-General* (4), *Cary v. Abbot* (5), and *Chamberlayne v. Brockett* (6), which clearly shew that the fund ought to be applied *cy-près*.

*E. Thurstan Holland*, for the trustees.

*Phillpotts*, in reply, submitted that the only question for consideration was whether there was a general charitable or a particular intention, and that the doctrine of *cy-près* could not be applied except where there was a general charitable intention in the will; and as no such intention could be discovered the doctrine could not be applied, and the Petitioner was entitled. The members of this society contributed to its funds, and in certain cases of sickness, and in old age, received payments from their own moneys. The Attorney-General was not a necessary party: *Anon.* (7). If the society had been a public charity the members could not have dissolved themselves and divided the funds. It was said that *Clark v. Taylor* was the case of a private charity, and if that were so this was still more clearly a private charity. In fact it appeared

(1) 5 Russ. 113.

(4) 3 Hare, 191.

(2) 3 Sm. &amp; Giff. 264.

(5) 7 Ves. 490.

(3) 1 Drew. 642.

(6) Law Rep. 8 Ch. 206, 211.

(7) 3 Atk. 277.

V.-C. H. not to be a charity at all, but a private assurance company. He asked that the rules might be received in evidence.

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Dec. 20. HALL, V.C., after stating the facts, continued :—

The Petitioner has contended before me that the gift to the friendly society was, if a good charitable gift, a gift to a private charity, and that such private charity having been dissolved, the testator's gift to charity has determined, there not having been, as the Petitioner alleges, any such gift for charitable purposes as that the fund must, by reason of the failure of the primary charitable object, be applied *cy-près* for charitable purposes. On behalf of the Attorney-General it has been contended that the testator's will must be construed as impressing the fund with charity, and that, although it cannot longer be applied as directed, it must be applied *cy-près*. It appears to me that the first inquiry is whether the gift to the friendly society is a gift to a charity. I have been furnished with a copy of the rules of the society, which was originally founded in July, 1777, and from them it appears to me that the society was one whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit in cases of sickness, lameness, or old age. Poverty of the member at the time of his sickness or lameness, or in his old age, was not required to entitle him to an allowance. It appears to me that the society was not a charitable institution. The legacy, when paid, augmented the society's funds; but such funds not being, as I consider, funds clothed with a charitable trust, their character was not wholly, nor, I think, to the extent of the addition, varied by such addition.

The gift was, I think, invalid, as aiming at creating a perpetuity, in which respect it is like the case of *Carne v. Long* (1). The society being dissolved, and the fund not being claimed by the trustees, who are Respondents to the petition, it and any dividends in Court must be transferred and paid to the Petitioner as representative of the executor and residuary legatee of the testator.

Solicitors: *Vizard, Crowder, & Co.*, agents for *Davy & Davy, Ringwood; Raven & Hare.*

*Ex parte* POWELL. *In re* MATTHEWS.*Bankruptcy—Order and Disposition—Hired Property—Custom—Appeal—Issue.*

Where a custom of holding certain goods on hire is relied on to take the goods out of the order and disposition of a bankrupt, the custom must be one which the ordinary creditors of the bankrupt may be reasonably presumed to have known.

Such custom may be proved either by reported cases, or by evidence of the custom as on a question of fact.

On the bankruptcy of an hotel-keeper a custom was alleged of hiring furniture for hotels. The custom was on slight, but uncontradicted, evidence considered by the Chief Judge (overruling the decision of a County Court Judge) to be sufficiently established, and on appeal, the Appellant having declined an offer to have the custom tried by a jury, the appeal was dismissed.

*MATTHEWS*, the bankrupt in this case, was an hotel-keeper at *Harrogate*, and he obtained furniture for the hotel from one *Milling*, a furniture dealer at *Leeds*. There was a dispute whether he had bought the furniture or hired it from *Milling*; but, in the opinion of the Chief Judge and of the Court of Appeal, the furniture was held to have been hired.

*Matthews* soon afterwards became bankrupt. *Milling* claimed the furniture as against the trustee in the bankruptcy, alleging that there was a well-known custom of letting furniture to hotel-keepers, so that the furniture was not in the order and disposition of the bankrupt. The County Court Judge, however, held that it was in the order and disposition, and passed to the trustee in the bankruptcy.

The facts and the result of the evidence are fully stated in the judgment of the Court of Appeal.

*Milling* appealed, and the appeal was heard before the Chief Judge in Bankruptcy on the 30th of July, 1875.

*Little*, Q.C., and *Bagley*, for *Milling*.

*Winslow*, Q.C., and *Yate Lee*, for the trustee.

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July 30.

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Nov. 18, 24;

Dec. 15.

Statement.

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Judgment,  
C. J. B.

BACON, C.J.:—

In my opinion, the evidence in this case is satisfactory and



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 Judgment,  
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sufficient. The question, as I said before, is of fact alone, the law being perfectly plain. I am called upon to discharge in some sense the functions of a jury, and in old times questions of order and disposition always were sent to a jury, though a jury would not possess the knowledge of the law which it is my duty to be possessed of.

It is exceedingly plain that from the very beginning there was an agreement that *Matthews* was to have these goods upon the terms that he should either hire them or should purchase them. [His Honour then stated and commented on the evidence.]

The agreement between the parties was carried into effect by a contract of hiring, without fraud or desire of preference, or any one single circumstance upon which even suspicion could rest, and the keeper of this hotel was left in possession of the goods upon the terms of the contract, and under a custom which is universal in this country, and of which the very slightest evidence (if any evidence is necessary) would be enough. He did that which other persons in his way of business do constantly. He was left in possession of these goods upon the terms contained in a deliberate, well-considered agreement; and unless I am to ignore the well-established custom of the trade, and am to disregard a custom which has been proved over and over again, there can be no doubt in my mind that these goods belonged to the lender of them, and that the bankrupt's only interest in them was that he should have them as long as he punctually paid the price at which they were hired.

To refer to cases upon such a subject does not seem to me to be very useful; nor, indeed, the law being, as I have said, well and conclusively established, is it useful at all in this case, because there is no important fact in dispute between the parties. Each tells his story in different words, but substantially there is no variance between them, unless I were to impute to *Milling* that he entered into that stipulation from the beginning to the end with the idea of trusting a man in whom he had no confidence with £1000 worth of his goods without security. The stipulation was from beginning to end, "Give me security, or you shall not have the goods," and I think that a presumption more violent—I was going to say absurd—cannot be suggested.

The case of *Ex parte Lovering* (1) was referred to, but no two things can be more different in their principles and more directly at variance with each other than *Ex parte Lovering* and this case. *Lovering* had over a long period the possession of certain chattels. He sold them to a broker, and by an agreement between them, communicated to no other human being, his actual ownership and possession were converted into a hiring. He became bankrupt; his possession had never been disturbed, whoever was the true owner, the transaction being simply between himself and the broker. The broker was the owner, but that the goods remained in the order and disposition of the bankrupt is sufficiently clear, and I cannot see the slightest analogy or resemblance between the two cases. The protection of society requires that the principles upon which *Ex parte Lovering* was decided should be at all times upheld, but it has nothing to do in the slightest degree with the present case. It is my opinion that the right of the Appellant is clear and distinct, and that the order disputing that right must be discharged.

The trustee in the bankruptcy appealed, and the case came on for hearing before the Court of Appeal on the 18th of November, 1875.

*Winslow, Q.C.*, and *Yate Lee*, for the trustee :—

It must be shewn that the custom is universal, or that it prevails at the particular place. Even if the custom had been proved to exist in *London*, or at *Richmond*, as in *Mullett v. Green* (2), that would not prove that it was known at *Harrogate*: *Hickenbotham v. Groves* (3); *Ex parte Newbery* (4); *Re Head* (5). There is no evidence, as in *Ex parte Watkins* (6), that the other creditors knew of this custom; and so in *Knowles v. Horsfall* (7), *Lingard v. Messiter* (8), and *Shuttleworth v. Hernaman* (9). It is very like *In re Hill* (10).

(1) Law Rep. 9 Ch. 621.

(2) 8 Car. & P. 382.

(3) 2 Ibid. 492.

(4) 10 L. T. (N.S.) 661.

(5) 12 W. R. 215.

(6) Law Rep. 8 Ch. 520.

(7) 5 B. & A. 134.

(8) 1 B. & C. 308.

(9) 1 De G. & J. 322. *34th*

(10) 1875. Mar. 24.

*In re HILL.*

*J. MARSTON*, a coach-builder at *Birmingham*, had been in the habit of letting out cabs upon what has been called the "deferred payment" principle, i.e., that the hirer paid a deposit and a certain sum every month, having

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The so-called hiring merely comes to this, that the goods belong to the hotel-keeper, but that if he does not pay for them the furniture dealer may seize them. He might not have been able to seize them when the bankruptcy occurred.

*Little, Q.C., and Bagley, for Milling:—*

The contract is clearly a contract for hire, with a collateral agreement for a sale. Very slight evidence of custom will suffice, for it is notorious that lodging-house keepers and hotel-keepers are in the habit of hiring their furniture. The same has been held as to machinery let for hire. It is very wrong to take one man's property to pay the creditors of another man.

There is evidence that these furniture dealers were in the habit of lending furniture in this way: *Ex parte Lovering* (1); *Mullett v. Green* (2); *Ex parte Emerson* (3). *Hamilton v. Bell* (4) overrules *Lingard v. Messiter* (5) and *Knowles v. Horsfall* (6). *Joy v. Campbell* (7) has always been approved of.

for a certain time the option of purchasing the cab, the deposit and the sums paid by him for hire in the meantime being then taken as part of the price. *J. Hill* hired on these terms two cabs, and had his name painted on them in gilt letters. *Hill* became bankrupt. The Judge of the County Court at *Nottingham* held that the cabs went to the trustee in *Hill's* bankruptcy as being within the order and disposition of the bankrupt, and that no custom of letting cabs had been proved. The Chief Judge in Bankruptcy reversed this decision, holding that the custom had been proved, and ordered the cabs to be delivered to *Marston*.

The trustee in bankruptcy appealed.

MELLISH, L.J., in delivering the judgment of the Court, said that the law on the subject had been settled by *Ex parte Watkins* (Law Rep. 8 Ch. 520), and that where the owner of chattels

could shew a well-known custom of letting such chattels they would be taken out of the order and disposition of the bankrupt. The custom must, however, be well proved and shewn to be known not only to persons in the same trade, but to others who were likely to be creditors. The evidence was very conflicting. No doubt *Marston* had long endeavoured to establish such a custom, but a man could not make a custom for himself. If he wished to preserve his right to his cabs, he must notify the fact that they are his, by a legible inscription on them. The order of the Chief Judge must, therefore, be discharged.

(1) Law Rep. 9 Ch. 621.

(2) 8 Car. & P. 382.

(3) 41 L. J. (Bkcy.) 20.

(4) 10 Ex. 545.

(5) 1 B. & C. 308.

(6) 5 B. & A. 134.

(7) 1 Sch. & Lef. 336.

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*Winslow*, in reply, declined, on the part of the trustee, to try an issue as to the custom; the estate, beside the furniture, was very small, and if the trustee failed he would have to bear the costs.

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Dec. 15. MELLISH, L.J., now delivered the judgment of the Court (*James*, L.J., *Mellish*, L.J., *Baggallay*, J.A., and *Brett*, J.):—

Judgment, C. A.

The question to be determined in this case is whether certain furniture, of which the Respondent *Milling* was the true owner, was, at the time when *Matthews*, the bankrupt, committed an act of bankruptcy, in the possession of *Matthews* as reputed owner, with the consent of *Milling*. The Judge of the County Court at *York* decided this question in favour of the trustee in the bankruptcy of *Matthews*, but his judgment was reversed by the Chief Judge.

*Matthews* was the proprietor of the *Railway Hotel* at *Harrogate*. *Milling* was a furniture dealer at *Leeds*, who, between the months of November, 1874, and March, 1875, supplied *Matthews* with a large quantity of furniture to furnish his hotel. It was argued by the Appellant before us that the furniture was in the first instance sold by *Milling* to *Matthews*, so as to make *Matthews* the true owner of the furniture and a debtor to *Milling* for the price of the furniture; but we agree with the Chief Judge that, according to the true effect of the evidence, the terms upon which *Matthews* was to have the furniture had never been finally agreed upon until April, 1875, when the parties made a formal agreement of hiring, and that the property in the furniture never passed to *Matthews*.

By this agreement between the parties it was agreed that *Milling* "hereby lets to the said *Charles Matthews* and *Charles Matthews* hereby takes of the said *Milling* the several articles of furniture belonging to him which are specified in the schedule" on certain conditions. The conditions were, that certain payments were to be made, and, in default of payment, *Milling* was entitled to retake possession of the furniture, but, if the whole of the payments were made, then the furniture was to become the property of *Matthews*.

*Matthews* accordingly remained in possession of the furniture

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under this agreement, until the 10th day of May, when he committed an act of bankruptcy.

Under these circumstances the furniture would clearly pass to the trustee as being in the possession of *Matthews* as reputed owner, unless such a custom of lending furniture by furniture dealers, either to the public generally or to hotel-keepers in particular, was proved as would prevent *Matthews* from being the reputed owner. Accordingly, affidavits of three furniture dealers, which were all substantially to the same effect, were given in evidence. One says, "I carry on business as an upholsterer and house furnisher at 73 and 75, *Brompton Road*. It is a common custom in the trade, in furnishing for persons who are unable to pay for the furniture and effects at the time when they desire to purchase the same, or who are not considered sufficiently worthy of open credit, to allow such persons to have the possession of furniture and effects upon agreement, which in the trade is technically called a hiring agreement, whereby, if certain arranged payments are duly made, the property in such furniture and effects becomes vested in the person entering into the said hiring agreement, but not until the whole of the arranged payments are duly made. Such agreements are frequently entered into by our firm."

These witnesses were not cross-examined, nor was any evidence given to contradict them. The County Court Judge, although we have no report of his judgment, must have held the evidence of the custom insufficient. The Chief Judge reversed that judgment, not upon the ground that the evidence, taken by itself, was sufficient to prove the custom, but upon the ground that the existence and validity of the custom had been proved so frequently in Bankruptcy Courts that the Court ought to take special notice of the custom.

There is no doubt that a mercantile custom may be so frequently proved in Courts of Common Law that the Courts will take judicial notice of it, and it becomes part of the law merchant; and we see no reason why the same rule ought not to prevail in the Court of Bankruptcy. It seems a useless expense to require parties to prove by a large number of witnesses a custom which has been proved over and over again.

The question, however, arises, how is the Court of Appeal to ascertain whether a custom has been proved so frequently that it ought to be acted upon under slight evidence, or no evidence at all? We think that we ought to give great weight to the testimony of the Chief Judge, but that we cannot act on his opinion alone. Now, the members of the Court of Appeal who have heard this case argued are not themselves aware of any case in which the question of the validity of any custom which would entitle *Milling* to judgment has been raised, except those which are contained in the reports, and which were cited in the argument. Nor did the experienced counsel who argued the case state that they had been engaged in any other cases in which the existence of the custom was raised.

Now the reported cases which were referred to seem to us insufficient to establish that the alleged custom had been frequently proved. They are few in number and are contradictory. We are also unable to ascertain what the precise custom was which we should hold to be so established, that judicial notice might be taken of it. And if we decided this case upon the grounds on which the Chief Judge decided it, we do not know whether there is held to be a general custom for furniture dealers to lend furniture to persons of every description, including hotel-keepers, or a more confined custom for furniture dealers to supply their customers, including hotel-keepers, with furniture under contracts of the description before us.

On the whole, we are of opinion that we cannot hold that any custom which would entitle the Respondent to the judgment of the Court has been proved in the Court of Bankruptcy in so many cases that the Court ought now to take judicial notice of it.

We have next to consider whether the affidavits produced before the County Court Judge were sufficient to establish a custom in favour of the Respondent, having regard to the fact that the witnesses were not cross-examined, and that no evidence was given on the other side. Now the question of the amount of evidence which is sufficient to establish a custom of the kind has been lately considered by the Court of Appeal in Chancery in the two cases of *Ex parte Watkins* (1) and *In re Hill* (2); and we think

(1) Law Rep. 8 Ch. 520.

(2) *Ante*, p. 503, n.

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that the result of these cases is, that in order to establish a custom it must be proved to have existed so long, and to have been so extensively acted upon, that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it.

The defect of the evidence in this case is, that, though it may prove that the practice of supplying customers with furniture under contracts of the description of that before us was one well known to and used by furniture dealers, it affords but a slight inference that it was so well known that the ordinary creditors of an hotel-keeper—the wine merchant, the spirit merchant, the brewer, the ordinary tradesmen of his town—were likely to know that it existed.

Under these circumstances, we came to the conclusion at the end of the argument that the case had not been satisfactorily tried, and we offered to do what we think the County Court Judge ought to have done—direct an issue respecting the existence of the custom to be tried by a jury. The Respondent was willing that such an issue should be tried, but we were informed by the trustee's counsel that there were not sufficient assets independently of the furniture to enable him to pay the cost of an issue, and that on that account he must decline an issue.

We do not at all blame the trustee for declining an issue, but we are of opinion that, an issue having been declined by the Appellant, we cannot reverse the judgment of the Chief Judge. Although the evidence for the custom was but slight, it was altogether uncontradicted.

The judgment of the Chief Judge must, therefore, be affirmed; but we think that, under the circumstances, it should be affirmed without costs.

Solicitors: *Sharp & Ullithorne; Torr & Co.*

106 Ch D 592

*Ex parte* PASCAL. *In re* MYER.

*Bankruptcy—Debtor's Summons—Foreign Debtor and Creditor—Debt contracted abroad—Place of Residence—Bankruptcy Act, 1869, s. 59—Bankruptcy Rules, 1870, r. 17.*

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Jan. 13.

A debtor's summons may be taken out by a foreign creditor against a foreign debtor who is at the time in *England* in respect of a debt contracted abroad.

The 59th section of the *Bankruptcy Act*, 1869, and Rule 17 of the *Bankruptcy Rules*, 1870, determine in what Court a debtor who is liable is to be sued, and do not affect the question whether he is liable.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

Mr. *Isaac Myer*, who carried on business as a jeweller and silver-smith at *Lima*, in the Republic of *Peru*, had business transactions with Messrs. *Pascal & Lacasse*, commission merchants in *Paris*, and in the course of such transactions became indebted to them in a considerable sum of money.

On the 14th of March, 1875, *Myer*, being at the time in ill health, which was aggravated by the recent loss of his wife, came to *England*, which he reached on the 4th of April, 1875, and had since been living as a guest at the house of his father-in-law, in *Belsize Park*, within the district of the *London Court* of Bankruptcy, except a short time which he had spent at *Brighton* for change of air. He stated in his affidavit that he had not paid for his board and lodging while staying in *England*, and that he intended to return to *Lima*, where he was domiciled, as soon as his health was re-established.

On the 16th of July, 1875, *Myer* was served with a debtor's summons, issuing out of the *London Bankruptcy Court*, at the suit of *Pascal & Lacasse*, in which they claimed £20,963 as due to them. In the summons he was allowed three weeks as a non-trader for meeting the claim.

On the 29th of July, *Myer* served notice of motion to dismiss the summons, on the ground that he did not reside or carry on business within the district of the *London Court* of Bankruptcy. The matter was heard on the 30th of August, 1875, when the

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16th D 483



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Registrar held that the debtor having merely been a guest, and not having paid for his board and lodging at his father-in-law's house, there had not been sufficient residence in *England* to give the Court of Bankruptcy jurisdiction, and dismissed the summons with costs. From this decision the creditors appealed.

*Myer* stated in his affidavit that he had been informed that proceedings in bankruptcy had been instituted against him by the same creditors in *Peru* since his departure for *England*, under which he had been declared a bankrupt; but the proceedings in *Peru* were not formally proved, so as to be in evidence in this matter.

Sir *H. Jackson*, Q.C., and *Sidney Woolf*, for the Appellants:—

A debtor's summons is analagous to a writ issued under the old practice by one of the superior Courts, and it has been well established that a mere temporary residence in this country will enable a creditor to commence an action against his debtor in an English Court if he can serve him in this country, although both debtor and creditor are foreigners. It makes no difference whether the debt was contracted in *England* or abroad, because an action for debt is a transitory action: *Jackson v. Spittall* (1). The Court of Bankruptcy has all the jurisdiction of a Court of Common Law: *Bankruptcy Act*, 1869, s. 65. Whether *Myer* can be made a bankrupt under the debtor's summons is a different question, and does not interfere with the validity of the debtor's summons: *Ex parte Mauritz* (2). But we contend that in this case *Myer* can be made a bankrupt, on the authority of *Ex parte Crispin* (3), where the liability of a foreigner to our bankruptcy laws was established, if he committed an act of bankruptcy in this country. Whether the debtor was "resident" in *England* or not is unimportant; for the 59th section contemplates the case of persons not resident in *England* being made bankrupt, and provides that the proceedings shall take place in the *London Court*. But the debtor was really resident in *England*, for he had lived here for some months, and it can make no difference whether he paid for his board and lodging or not.

(1) Law Rep. 5 C. P. 542.

(2) Law Rep. 5 Ch. 779.

(3) Law Rep. 8 Ch. 374.

*Swanston*, Q.C., and *Robson*, for the debtor:—

This is the first case in which a foreigner has endeavoured to make another foreigner a bankrupt for a debt not contracted in *England*. In *Ex parte Crispin* (1) the debt was contracted in *England*, and that was one of the grounds on which the jurisdiction of the Court was founded. The English Court cannot give a good discharge on a debt arising abroad and regulated by foreign law: *Ellis v. M'Henry* (2). We admit that a common law action might have been maintained in this case, but a debtor's summons stands on different grounds from a writ in an action. It must be founded on a debt which will support a petition in bankruptcy (*Bankruptcy Act*, 1869, s. 7), which the debt in this case could not do. It is, in fact, the foundation of proceedings in bankruptcy, and the Court cannot separate the questions of jurisdiction in the debtor's summons and jurisdiction in the bankruptcy. In *Ex parte O'Loughlen* (3) Lord Justice *James* is reported to have said, speaking of a debtor resident in *Ireland*, who came occasionally to *England*: "Whether these circumstances would have enabled him to be served when in *England* is a matter on which I feel considerable doubt; indeed, at present I feel more than doubt. It would be strange if a foreigner coming to *Southampton* by steamer could be made a bankrupt for disobeying such a summons."

[JAMES, L.J.:—That was only an *obiter dictum*, and perhaps I went too far in so expressing myself.]

The object of bankruptcy proceedings is to distribute the assets of the debtor, and they ought to be taken in the country where the assets are. *Myer* has no assets in *England*, and we know, although it may not be formally in evidence, that bankruptcy proceedings are pending in *Peru*, where all his property is. Therefore, a bankruptcy in this country would be nugatory, and only serve to harass the debtor.

JAMES, L.J.:—

The only point on which it is now necessary to give an opinion

(1) Law Rep. 8 Ch. 374.

(2) Law Rep. 6 C. P. 228.

(3) Law Rep. 6 Ch. 406, 410.

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is, whether a foreigner, in respect of a debt contracted abroad, can take out a debtor's summons against another foreigner who happens to be at the time in *England*. The old law was that a foreigner could be sued by a foreigner, if found in this country, in respect of a foreign debt. He could also be held to bail under the old writ of *capias*; he could be kept in this country under a judge's order; judgment could be enforced against his person, he could be shut up in prison, and could petition for his discharge under the *Insolvent Debtors Act*. By the bankruptcy law now in force, all that process has been abolished, and a new process instituted, by which the creditor takes out a debtor's summons, and the debtor is relieved from other penalties. There is nothing in the Act to say that persons having the benefit of, or liable under, the old law, are not to have the benefit or be subject to the new law. With respect to the proceedings in *Peru*, if it could be shewn that the debt was discharged in any way, that would be sufficient; but no such evidence has been given. It is only said that a petition for adjudication in this country would be idle, because all the assets are in *Peru*, and that proceedings with respect to this very debt are pending in that country; but it has not been shewn that the debtor is discharged from the debt by the operation of the proceedings in *Peru*. All that question will be open on the petition for adjudication, and if it be found that the distribution of the assets will take place abroad, the proceedings in this country may be stayed. All that is decided now is that a debtor's summons can be served upon the debtor in the same way as a writ under the old law.

MELLISH, L.J.:—

I am of the same opinion. It was decided in *Ex parte Crispin* (1) that if a foreigner comes to *England* and contracts debts, and commits an act of bankruptcy in *England*, he can be adjudicated a bankrupt. In that case the debt had been contracted in *England*; it is now to be considered whether it makes any difference that the debt was contracted abroad. I am of opinion that it makes no difference. A man cannot be made bankrupt

(1) Law Rep. 8 Ch. 374.

unless he is subject to the laws of *England*; if, therefore, he has left *England* without committing an act of bankruptcy in *England*, this Court cannot touch him. In the present case the debtor has been staying in *England*. I cannot see why a debtor's summons should not be served on him while here; it is only a means by which the creditor recovers his debt. With respect to the proceedings in *Peru*, there is no evidence what the nature of those proceedings is; and that is a matter which will be open to the debtor on the petition for adjudication.

As to the question of residence, the 59th section of the *Bankruptcy Act*, and Rule 17 of the *Bankruptcy Rules*, 1870, are merely intended to determine in what Court a man who is liable is to be sued, and do not affect the question whether he is liable. A man who is liable cannot escape liability by saying that he is not resident in the place where he is sued. So long as he is staying at a place it is his residence within the 59th section, unless he can shew that he has some other residence.

BAGGALLAY, J.A. :—

I am of the same opinion and for the same reasons.

JAMES, L.J. :—

The Court simply discharges the order of the Registrar. All that we have determined is, that the debtor, being in *England*, is liable to proceedings by debtor's summons in respect of the debt, though contracted abroad.

Solicitors : *Abrahams & Roffey ; Sydney & Son.*

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*Ex parte* DEAR. *In re* WHITE.*Bankruptcy—Partnership—Joint and Separate Estate.*

*D.* carried on business in partnership for a term with *W.* and *W. Jun.*, under articles providing that *D.* should be a partner in the profits, but not in the capital, and should not be required to bring in any capital. After allowing interest at £5 per cent. on the capital, which belonged solely to *W.*, the net profits were to be divided half-yearly in certain shares. At the expiration of the term *D.*'s interest in the concern was to cease. If *D.* died during the term his representatives were to receive nothing more than a proportionate part of his share of the profits of the current half year for the period up to his decease, such proportionate part to be ascertained, not by a fresh stock-taking, but according to the average of the last two preceding half-yearly stock-takings. *D.* died. Afterwards *W.* died, and the business was carried on by *W. Jun.*, who was also executor of *W.*, and who afterwards went into liquidation. There were at this time assets existing in specie which belonged to the business during the partnership between the three:—

*Held*, that on the construction of the articles, *D.*'s right to be indemnified out of the assets against the debts of the firm had not been taken away; that the assets remaining in specie were therefore primarily applicable to payment of the joint debts of *D.*, *W.*, and *W. Jun.*, and that those joint creditors, therefore, could not come against the separate estate of *W. Jun.*, till his separate creditors had been paid in full.

*Ex parte Morley* (1) followed.

*In re Simpson* (2) distinguished.

THIS was an appeal by *Charles Dear* from an order of Mr. Registrar *Pepys*, sitting as Chief Judge. The Registrar had directed a sum of £48,000 to be applied as to £44,792 12s. in payment of the separate creditors of *W. Thompson White*, and as to £3207 8s. in payment of the joint creditors of *W. Thompson White* and *William White*, deceased, who had carried on business under the firm of *White, Son, & Co.* The object of the Appellant was to have the whole estate which had come to the hands of the trustee applied in payment *pari passu* of all the creditors of the firm of *White, Son, & Co.*, without regard to whether their debts were contracted before or after the death of *William White*, or before or after the death of *Charles Dear, Sen.*, who had been a partner in the firm.

The changes in the constitution of the firm were as follows:—

(1) Law Rep. 8 Ch. 1026.

(2) Law Rep. 9 Ch. 572.

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13CLP.467

From March, 1843, to December, 1844, the partners were *William White*, *S. Greenwell*, and *Charles Dear*, Sen.; from December, 1844, to March, 1849, *W. White*, *W. Thompson White*, *Charles Dear*, Sen., and *Smith Greenwell*; from March, 1849, to February, 1854, *W. White*, *W. T. White*, and *C. Dear*, Sen.; from February, 1854, to June, 1858, *W. White*, *W. T. White*, *C. Dear*, Sen., and *E. C. Collins*; from June, 1858, to February, 1870, *W. White*, *W. T. White*, and *C. Dear*, Sen. *Charles Dear*, Sen., died in February, 1870, and from that time *W. White* and *W. T. White* were the only partners till the death of *William White* in January, 1871, after which the business was carried on by *W. T. White* alone.

When *Charles Dear*, Sen., first became a partner, a deed dated the 7th of March, 1843, was executed, which recited to the effect that *Dear* had for three years had the management of the business of carpet warehousemen carried on by *W. White* and *Smith Greenwell* in *Watling Street*, and that they, being desirous to reward his services and secure his attention to the business, had agreed to admit him to a participation of the profits of that business upon the terms thereafter mentioned, without requiring him to find any capital. By this deed it was agreed that *Dear* should be a partner in the profits of the business, but not in the capital or stock thereof, with *White* and *Greenwell*, and any other persons whom *White* and *Greenwell*, or the survivor of them, should from time to time, under a power contained in the deed, admit into partnership; such partnership as to *Dear* to be for twelve years from December, 1842, if either *White* or *Greenwell* should so long live, but subject to a power of determination by notice as therein mentioned. If *Dear* died during the partnership his representatives were to receive a proportionate part of his share of the profits of the current half-year for the period up to his decease, but nothing more. If either *White* or *Greenwell* died, his share in the partnership was to go to his representatives, *Dear's* share of profits remaining unaltered. If both *White* and *Greenwell* died during the term, *Dear* was to receive £500 and a proportionate part of his share of profits up to the death of the survivor, and his interest in the concern was thereupon to cease. On the expiration of the term *Dear's* interest in the concern was to cease, and his share of profits devolve upon the other partners. Then followed a clause

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enabling *White* and *Greenwell* to admit any other persons as partners, not affecting *Dear's* share of profits. Then came a number of clauses similar in form to those of ordinary partnership deeds, the first three of which provided for the name of the firm, the application of premiums and apprentice fees, and the management of the business. Another clause provided that the whole of the stock and capital should be furnished by *White* and *Greenwell*, and that *Dear* should not be bound to provide any part of it; and that *White* and *Greenwell* should have interest at £5 per cent. on their respective amounts of capital before division of profits. *Dear* was to receive on account of his share of profits £500 a year by monthly payments. There was a provision for half-yearly stock-takings to be signed by all three partners, and, after deducting expenses and interest on capital, the net profits were to be divided, so that *Dear* should receive one-fourth, and the other three-fourths should be equally shared by *White* and *Greenwell*. Another clause provided that if *Dear* should die, or the partnership should be dissolved as to him during the course of any current half year, there should be no new stock-taking, but the proportionate part of his share of profits for the current half year should be ascertained according to the average of the last two preceding half-yearly stock-takings.

The interest of *C. Dear, Sen.*, throughout his connection with the firm, was the same as under the above deed.

On the 2nd of March, 1872, *W. T. White* filed a petition for liquidation by arrangement, and his estate was now being administered by the Court of Bankruptcy.

The Appellant, *Charles Dear*, was a creditor of the firm in respect of a debt contracted while the firm consisted of *W. White*, *W. T. White*, and *C. Dear, Sen.* It did not appear distinctly on the evidence, but was admitted at the Bar, that there were in existence specific assets which had belonged to the firm while it consisted of the above three partners.

In August, 1875, the Appellant gave notice of motion that it might be declared that there were no joint assets of the three partners, *W. White*, *W. T. White*, and *C. Dear, Sen.*, on the ground that at the death of *C. Dear, Sen.*, all the partnership assets became the property of the two survivors—that it might

be declared that the estate of *W. White* and *W. T. White* had been so blended with that of *W. T. White* that they were undistinguishable—and that it might be declared that, under all the circumstances, the property vested in the trustee under the liquidation ought to be divided *pari passu* among all the creditors of *White, Son, & Co.*, without any distinction between those whose debts were incurred before, and those whose debts were incurred after, the deaths of *C. Dear*, Sen., and *W. White* respectively.

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Roxburgh, Q.C., and *Channell*, for the Appellant:—

The assets of the firm belonged, by the terms of the partnership deed, to the survivors. There are, therefore, no joint assets: *In re Simpson* (1). There being no joint estate, the joint and separate creditors come in *pari passu*.

De Gex, Q.C., *Winslow*, Q.C., and *Finlay Knight*, for the trustee:—

It may be stipulated by a partnership deed that all the assets shall belong to the surviving partner, but that *primâ facie* means the assets subject to payment of debts. The unmonied partner has a right to insist on the assets being applied in payment of the debts of the firm, and this right can only be parted with by plain words.

[MELLISH, L.J.:—Suppose, after the death of a partner, the executors sell his interest in the assets to the survivors. Does not that put an end to the joint estate?]

We admit that it does.

[MELLISH, L.J.:—Is it not the same thing if, by the partnership deed, it is stipulated that the assets shall be the property of the surviving partner?]

It is a question on the terms of the instrument whether the partner who dies first has, by the partnership deed, given up his right to indemnity out of the assets. Under the special terms of the deed in *In re Simpson*, it was held that he had; but the deed here is quite different, and the case comes within *Ex parte Morley* (2). In order to alter the rights of the creditors by turning joint into

(1) Law Rep. 9 Ch. 572.

(2) Law Rep. 8 Ch. 1026.

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[JAMES, L.J.:—A man is a creditor at law of the surviving partner, and upon going in to prove is told “you cannot prove because you are also a creditor of the deceased partner.” How can he thus be deprived of his right to go against the survivor’s estate? Lord *Eldon*, in *Gray v. Chiswell* (3), felt the difficulty.]

Whatever be the reason of the rule, it is firmly established : *Ex parte Wilson* (4).

. *Roxburgh*, in reply.

JAMES, L.J.:—

Now that the whole case is clearly before the Court, having been fully argued, though at no greater length than was required, I think we can clearly see our way to a decision. The question is, whether the case is within the principle of *Ex parte Morley* (5) or within that of *In re Simpson* (6), both of which, having been decisions of this Court, are binding upon us unless they are inconsistent with each other. I am of opinion that this case is clearly within *Ex parte Morley*, and distinguishable from *In re Simpson*.

The facts are these. Mr. *Dear* had no share in the capital—the net capital—of the concern. He was not to bring in anything, but he was to be paid as a working partner—paid, in fact, for his services by a share in the profits; and in case he died during the half year, he was only to have a sum given to him or his representatives, based on the profits of the two preceding half years. Nothing is said at all about a sale of the assets or about the right to deal with them; they were, therefore, to continue in the surviving partner, and the surviving partner was to continue the business with them. *Dear’s* executors would then have a right to say to the survivor, You may continue the business, but you must pay the debts. You have got property which was bought on our testator’s credit, and for which we are now liable; and if you do not pay the debts as they fall due you have no

(1) 6 Ves. 119.

(2) 4 D. J. & S. 664.

(3) 9 Ves. 118.

(4) 3 M. D. & D. 57.

(5) Law Rep. 8 Ch. 1026.

(6) Ibid. 9 Ch. 572.

right to have that property. From the moment there was the slightest default in the payment of one single debt, the right of the executors would be to say, We must have the assets in respect of which the debts for which we are liable were contracted applied in payment of those debts. That was the right of *Dear's* representatives—the same right as the father's representative had against the son in *Ex parte Morley* (1). Therefore this seems clearly to be within the principle of that case, and not within that of *In re Simpson* (2), which was distinguished by the Chief Judge and by us in this way—that there, in substance, there was a sale to the surviving partners of the right to have the assets applied in this way. It appears now that there was, and is still existing in specie, property which was the joint estate of the three, and applicable to the payment of the joint debts of the three; and there being a joint estate, it is the settled rule that the joint estate must be applied first in payment of joint creditors, and the separate estate in payment of separate creditors, and that only the surplus of each estate is to be applied in satisfaction of the other class of creditors.

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MELLISH, L.J.:—

I am of the same opinion. The ordinary rule is, that, although the surviving partner only can be sued at law for the debts of the firm, the executors of the deceased partner are also liable in equity, and therefore are entitled to have the assets applied in payment of the debts. They may, if they please, sell their interest in the assets to the surviving partner. If they do so, and take, instead of their right to be indemnified out of the assets, a simple covenant to indemnify them against the debts, the assets cease to be joint assets. In *In re Simpson* we held that the same rule would apply when the sale was effected by the provisions of the partnership deed itself, and not by a deed executed by the executors after the death of the partner. The question in this case is whether there is anything to shew that, either by the deed of partnership or independently of the deed of partnership, the executors of *Dear* have lost their right to be indemnified out of the assets. In my opinion there is nothing at all to shew it. The deed shews us, no

(1) Law Rep. 8 Ch. 1026.

(2) Law Rep. 9 Ch. 572.

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doubt, that *Dear* brought in no capital, and that, as between *Dear* and *White*, Sen., the capital was always the capital of *White*, Sen. *Dear* was to receive a share of the profits, and if he died, his executors were to receive an equivalent for his share of the profits up to his death, which was not to be ascertained by taking an account, but by reference to the profits of preceding half years. But surely, if a person was to be entitled to have profits, those profits could be only calculated on the assumption of the debts being paid. To make out a profit and loss account, the debts are deducted, and the profits are ascertained on the footing that the debts have been paid. They may not have been paid in fact, but they are taken to be paid for that purpose. Therefore, if *Dear* during his lifetime received his share of the profits in any year, and afterwards it turned out that the debts of that year were not really paid, they would have to be paid out of the capital, that is to say, would have to be paid by *White*, Sen. In my opinion there is nothing to shew that the executors of *Dear*, after *Dear* was dead, had not exactly the same right which he had to have the debts paid out of the assets, on the ground that they were entitled to a share of profits calculated on the assumption that the debts were to be paid out of the assets. They have not sold their right to have their debts paid out of the assets, nor taken a covenant of *White* that he would indemnify them against the debts as a substitute for their right to have the debts paid out of the estate, and therefore I am of opinion that the debts are still payable out of the assets. That being so, and there being assets of the old firm which have come to the hands of the trustee, the joint creditors of the three are entitled to have those assets applied as joint estate of the three. The creditors of the three then have priority as against these assets, and it necessarily follows that they cannot take any of the separate assets of the survivor until the separate creditors have been paid in full.

BAGGALLAY, J.A. :—

I am of the same opinion. This case has been argued mainly on the question whether it falls within the principles enunciated in *Ex parte Morley* (1) or those enunciated in *In re Simpson* (2). But the principles enunciated in *Ex parte Morley* are no new principles

(1) Law Rep. 8 Ch. 1026.

(2) Law Rep. 9 Ch. 572.

at all. They are the result of a long list of authorities all relating to the like circumstances. I was for some time unable to see how *In re Simpson* (1) could be reconciled with the former authorities, but a more matured consideration of the facts and the authorities leads me to a conclusion that it can, because the facts of *In re Simpson* were very special. The Chief Judge, in giving his judgment in that case, pointed out the distinction between it and *Ex parte Morley* (2). It is unnecessary to go through his reasons, which clearly and distinctly shew the difference between the two cases, and it appears to me that the principles of *Ex parte Morley* are perfectly applicable to the present case.

Solicitors : *W. Bristow ; Allen & Son.*

*Ex parte* FORD. *In re* CAUGHEY.

*Order and Disposition—Liquidation Petition—Property acquired by undischarged Debtor—Second Liquidation Petition—Rights of Creditors under First Petition—Evidence of Knowledge and Consent—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 15, 26, 54, 125.*

The creditors of a trader who had filed a liquidation petition resolved that he should have his discharge when they had received 2s. in the pound on their debts. The estate realized only half that sum. The debtor went into business again and contracted new debts, and afterwards filed a second liquidation petition :—

*Held*, by *Bacon, C.J.*, and by the Court of Appeal, that, in the absence of positive evidence that the trustee or the creditors under the first petition were aware of the subsequent trading, they were entitled in priority to the new creditors to the assets acquired by the debtor in the course of his trading, to the extent necessary to make up the 2s. in the pound.

It could not be assumed that the old creditors intended, when they passed their resolution, that the debtor should trade again in order to be able to pay the 2s. in the pound.

*In re Rawbone's Trust* (3) commented on.

IN July, 1870, *W. F. Caughey* and *H. H. Caughey*, two brothers, who had carried on the business of corn merchants in partnership under the firm of *J. & A. Caughey*, filed a liquidation petition.

(1) Law Rep. 9 Ch. 572.

(2) Law Rep. 8 Ch. 1026.

(3) 3 K. & J. 476.

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572 D. 63.  
7 Ch. D. 140  
— 421  
16 Ch. D. 570  
19 Ch. D. 143

Statement.

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The first meeting of the creditors was held on the 27th of July, 1870, when it was resolved that the affairs of the debtors should be liquidated by arrangement, that *T. W. Read* should be appointed trustee, and that the debtors should be entitled to receive their discharge when the creditors should have received 2s. in the pound on the amounts of their respective debts, notwithstanding the fact that the liquidation might not have been closed. The estate was realized by the trustee, but it was only sufficient to pay the creditors a dividend of 10½*d.* in the pound, and this dividend was declared in April, 1871. No resolution was ever passed fixing the close of the liquidation.

After the resolutions had been passed, *W. F. Caughey* went into the same business again alone. He traded under the firm of *Caughey Brothers*, and he occupied the same stall in the corn market at *Liverpool* which had been previously occupied by himself and his brother. In July, 1873, he filed a liquidation petition. In his statement he inserted among his creditors all the creditors of the old firm of *J. & A. Caughey*, and notice of the first meeting was sent to all those creditors, as well as to his own separate creditors. Some of those joint creditors attended the first meeting, which was held on the 21st of August, 1873. It was then resolved that the affairs of the debtor should be liquidated by arrangement; that *A. L. Ford* should be appointed trustee; and that the trustee should be and was thereby empowered to sell the estate of the debtor to him for the sum of £475, payable as follows: £130 within one month from the registration of the resolutions, £172 10s. within three months, and £172 10s. within six months from registration of the resolutions; and that on payment of these several amounts the debtor should be entitled to his discharge. These resolutions were duly registered, though an objection to the registration was in the first instance made by the Registrar, on the ground that the first liquidation was still pending. The debtor afterwards paid the whole of the £475 to the trustee, and he, in July, 1874, applied to the County Court for its direction as to the way in which he ought to distribute this sum. On the 5th of March, 1875, the Judge made an order declaring that, as the first liquidation was not closed, the whole of the £475 formed part of

the estate of *W. F. Caughey* divisible among his creditors under the first liquidation. That sum was not enough to make up the 2s. in the pound. From this order the trustee under the second liquidation appealed.

When the appeal came on to be heard before the Chief Judge his Lordship was of opinion that the facts had not been sufficiently brought before the County Court Judge, and he therefore ordered that the appeal should stand over generally, and that the whole matter should be referred back to the County Court Judge to decide the rights of the creditors under both liquidations, and to deal with the whole case. The matter came on again to be heard by the County Court Judge on the 2nd of July, 1875. The debtor was examined and said: "My present estate is the result of my new business. From time to time since I have carried on my new business I have seen Mr. *Read* in the street. I never had any conversation with Mr. *Read* about my new business. The notice of the old liquidation was in the papers, and the new creditors, I think, must therefore have known, but I do not know as a fact that they did know of it." *Read*, the trustee under the first liquidation, was examined, and he said: "I had no knowledge of the debtor having commenced business, except so far as I might have judged from meeting him in the neighbourhood where the corn trade is carried on, in *Brunswick Street* and two or three neighbouring streets, which are devoted peculiarly to the corn trade. I have often been in the corn market, many times since 1870, not as a trader, but to see persons there. I may have seen the debtor there. I have no recollection, particularly, of having seen him there. I am an accountant very much employed by the corn traders." *Ford*, the trustee under the second liquidation, deposed that it was explained by him at the meeting of the 21st of August, 1873, that the old partnership creditors could not expect to receive anything until the new creditors had received 20s. in the pound. There were no old creditors present at that meeting in person, but only by proxies. On the 29th of July, 1875, the Judge made an order confirming his former order of the 5th of March, 1875. The trustee under the second liquidation appealed to the Chief Judge, and the case was heard on the 15th of November, 1875.

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C. A. *Finlay Knight*, and *W. R. Kennedy*, for the Appellant:—

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Argument.

We contend that the new creditors are entitled to the £475 in priority to the old ones. Even if the evidence does not conclusively prove that the trustee under the first petition was aware of the subsequent trading, yet the old creditors must be taken to have known that the debtor would not be able to pay the 2s. in the pound unless he went into trade again, so as to create some new assets, and to have intended that he should do so for that purpose. It would, therefore, be equitable that the new creditors, who have in fact created the new assets, should be paid in priority to the old creditors. The principle of such cases as *Troughton v. Gitley* (1); *Tucker v. Hernaman* (2); *Ex parte Hannington* (3); *Engelback v. Nixon* (4); *Ex parte Tinker* (5), applies. But the fair inference from the evidence is, that the trustee under the first petition and the old creditors must have known of the subsequent trading. At any rate, the new creditors ought to share rateably with the old ones in the distribution of the £475, for the old creditors assented to the second liquidation. The principle of sect. 54 of the *Bankruptcy Act*, 1869, has some application, viz., that when the debts proved in a bankruptcy are, after its close, to be enforced against the property of an undischarged bankrupt, this right is expressly made subject to the rights of any creditors who became such after the close of the bankruptcy. *Ex parte Sydney* (6) does not apply, because the resolutions under the second petition have been registered.

*T. H. James*, for the trustee under the first liquidation, was not heard.

Judgment,  
C. J. B.

BACON, C.J.:—

The question is mainly one of fact; the principle of law applicable to it is quite plain. If an undischarged liquidating debtor traded with the assent or the knowledge of his creditors or the trustee, his subsequent creditors, who had no notice of the prior

(1) Amb. 630.

(2) 4 D. M. & G. 395.

(3) 18 W. R. 959.

(4) Law Rep. 10 C. P. 645.

(5) Ibid. 9 Ch. 716.

(6) Ibid. 10 Ch. 208.

liquidation, would be entitled to the assets which he acquired in the course of his trading in priority to the old creditors. In the present case the debtor was undischarged, for his discharge was only granted subject to a condition, which he had not performed. So long as a debtor is undischarged all the property which he acquires after the commencement of his liquidation belongs to the creditors under the liquidation. That was the decision of the Court of Appeal in *Ebbs v. Boulnois* (1), and it is binding on me. In this case, therefore, the rights of the creditors under the first petition to the debtor's property remained until they had got the 2s. in the pound on their debts. The facts in *Tucker v. Hernaman* (2) were very peculiar; the facts of the present case do not seem to me to justify a similar conclusion. I referred the case back to the County Court Judge that he might ascertain the facts, and I must now take it that he is of opinion that the trustee under the first liquidation has done nothing from which it can be inferred that he assented to the debtor's subsequent trading. The trustee was examined, and nothing of the kind suggested has been proved. It is quite consistent with the justice of the case, as well as with the law, to say that the trustee under the first liquidation is entitled to this money. The order of the County Court is therefore right.

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FORD.*In re*  
CAUGHEY.Judgment,  
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The trustee under the second liquidation appealed from the decision of the Chief Judge, and the case came on to be heard before the Court of Appeal on the 20th of January, 1876.

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*De Gex*, Q.C., and *Finlay Knight*, for the Appellant :—

Argument.

The real question in this case is, whether the trustee in the first liquidation knew of and assented to the subsequent trading by the debtor whereby he acquired the property in question. If he did know and assent, the property belongs to the creditors in the second liquidation, both as property in the order and disposition of the debtor with the consent of the true owner, and also under the well-established doctrine of equity, that the owner of property may not stand by and see another man expending money and

(1) Law Rep. 10 Ch. 479.

(2) 4 D. M. &amp; G. 395.



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trouble upon his property, and acting as if it were his own, and then claim it from him.

In the first place, it is clear from the resolutions passed by the creditors under the first liquidation, that they intended the debtor to recommence trading; how else was he to pay them the dividend of 2s. in the pound, which was known to be far more than the assets would produce? Secondly, the evidence is sufficient to shew that in fact the trustee did know that the debtor was in business. He lived in the same town and met him occasionally in the corn market. In the third place, it was the duty of the trustee, in the interest of the creditors, so long as the debtor was undischarged, to look after the debtor and see what property he became possessed of, and therefore knowledge and consent must be imputed to him even though he might not have it in fact: *Troughton v. Gitley* (1); *Ex parte Bourne* (2); *Englebank v. Nixon* (3); *Ex parte Tinker* (4); *In re Raubone's Trust* (5). In the last-mentioned case, Lord Hatherley, then Vice-Chancellor, said (6): "I could have no doubt that laches on the part of the insolvent assignee would have amounted to consent within the meaning of the (Bankruptcy) Act. And this applies to *Troughton v. Gitley*, and all that class of cases. In *Troughton v. Gitley*, the bankrupt went on trading for four years after his bankruptcy without interruption from the assignees; and there it was held that they must be postponed to the subsequent creditors, it being their duty to look after their debtor and see what he was doing, and what debts they were allowing him to incur."

*Little*, Q.C., and *T. H. James*, for the trustee in the first liquidation, were not called on.

Judgment, C. A. COCKBURN, L.C.J. :—

The first question in this case is whether the property acquired by the undischarged debtor was in his order and disposition with the consent and permission of the true owner; and in considering it we may assume that the goods were really the property of the

(1) Amb. 630.

(2) 2 Gly. &amp; J. 137, 141.

(3) Law Rep. 10 C. P. 645.

(4) Law Rep. 9 Ch. 716.

(5) 3 K. &amp; J. 476.

(6) Ibid. 485.

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32 L.R. 836

trustee in the first liquidation. This question is entirely one of fact: there is no legal rule or equitable doctrine which imposes on us in this case the necessity of drawing any inference different from that which a jury would draw from the facts before us.

If the goods were in the order and disposition of the debtor with the consent of the trustee in the first liquidation, they must have been so with his knowledge, for consent presupposes knowledge. Is there, then, sufficient proof that he had knowledge that the debtor was carrying on business and had become possessed of this property? On this point the evidence appears to me weak, and quite insufficient to establish the fact of such knowledge. It is true that the trustee and the debtor lived in the same town; but *Liverpool* is a large place, and the trustee may well have been ignorant of the occupation of the debtor. They were both connected with the corn market, and the debtor had a stall there; but the trustee was an accountant, and lived in a different part of the town, and was only occasionally in the corn market. He declares that he was ignorant of the fact of the debtor carrying on business on his own behalf; and the debtor does not say that he ever held any conversation with the trustee on the subject of his business. He admits that they only met casually in the street. There is a total absence of any evidence on which a jury could come to a conclusion that he knew of the debtor carrying on business or acquiring property.

The second question is whether it must be taken from the terms of the resolution for the discharge of the debtor, that he afterwards carried on business with their consent. All that the creditors agreed to was that the debtor should give up all his assets to be distributed in the liquidation, and that when the creditors had been paid 2s. in the pound the debtor was to have his discharge. It was argued that this implied that the creditors gave their assent to the debtor going into trade in order to acquire the difference between the sum which the assets would produce and the amount of 2s. in the pound; that he could only acquire this sum by some employment, and that the most natural employment for him was embarking again in the trade which he carried on before his liquidation. We are not obliged to hold that any such implication arises. On the contrary, the creditors might well suppose that he

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did not intend to trade at all. He had given up all his property to his creditors, and as he had been unable to raise 2s. in the pound for his creditors, the presumption was that he had no means by which to produce capital to enable him to re-embark in trade.

On these grounds I see no reason to differ from the conclusions at which the County Court Judge and the Chief Judge have arrived.

JESSEL, M.R. :—

*74 D 148* I am of the same opinion. Had it not been for the point of law raised in the argument, which derived some countenance from the *dictum* of Lord *Hatherley* in *In re Rawbone's Trust* (1), I should not have added anything. If the Appellant is to succeed at all, he must succeed either on the general equitable doctrine, of which *Troughton v. Gitley* (2) is only an example, that a man cannot stand by, having a charge or incumbrance upon property, and allow another to advance money on it on the supposition that it is unincumbered. That assumes that he has knowledge that the other man is going to advance money, and suppresses the fact of his own interest. So the owner of land may not stand by and allow another person to lay out money in building on it, as if it was his own land. But there, again, you must shew that he knew that the other person was laying out the money under the false belief that the land was his own. In my opinion Lord *Hatherley* did not intend to lay down any other doctrine than this in his *dictum* in *In re Rawbone's Trust*.

But there is another doctrine on which the Appellant relies, namely, the doctrine in bankruptcy of reputed ownership. The words used in the Act are "consent and permission." Those words imply knowledge. You cannot consent to a thing unless you have knowledge of it. It is impossible to suppose that these words do not imply that the true owner has at least a knowledge of the events which happened; but I think they imply something more, there must be a voluntary allowance on the part of the true owner of that mode of dealing with the property.

As to the facts, I agree with the Lord Chief Justice that there

(1) 3 K. & J. 485. *38 Ch D 829* (2) Amb. 630.

is in this case no evidence of knowledge; therefore the doctrine of reputed ownership has no application, nor the other equitable doctrine to which I have referred. It has never been decided that it is the duty of creditors or of the trustee to look after an undischarged debtor, or that if they do not look after him, though they may not be aware of what he is doing, they are guilty of laches, and their consent is equivalent to consenting to the debtor so dealing with the property. Such a notion is opposed to the terms in which both the equitable rule and the rule in bankruptcy are always stated; and although there may be cases of laches so nearly approaching to fraud that the Court comes to the conclusion that knowledge must be attributed to the person guilty of such laches, still it is not mere neglect, but neglect considered as an element tending with other circumstances to shew that he must have had such knowledge. I therefore think that there is no law on this subject extending beyond the two rules which I have alluded to, and that if the *dictum* of Lord *Hatherley* was intended to add anything to them, it has no foundation in authority, but is only an inaccurate reference to the decision in *Troughton v. Gitley* (1).

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MELLISH, L.J. :—

I am of the same opinion.

BAGGALLAY, J.A. :—

I am of the same opinion.

Solicitors for Appellant: *Clarke, Woodcock, & Ryland*, agents for *Lyon & Reynolds, Liverpool*.

Solicitor for Respondent: *S. C. H. Sadler*, agent for *T. Bellringer, Liverpool*.

(1) Amb. 630.



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*Ex parte CRUMP. In re HENDREY.*

*Bankruptcy—Public Examination of Bankrupt—Adjournment—Written Requisitions—Bankruptcy Act, 1869, ss. 19, 96.*

A trustee in bankruptcy examined the bankrupt at his public examination concerning certain alleged fraudulent transactions, on which he had previously examined him in private, but failed to obtain satisfactory explanation. The Registrar, sitting as Chief Judge, against the wish of the trustee, stopped the public examination, considering that it was a waste of public time, and adjourned it to a future day, ordering the trustee in the meantime to deliver written requisitions to the bankrupt as to the points on which he required information:—

*Held*, that even if the Registrar had power to order the trustee to deliver such written requisitions, which (*semble*) he had not, he had not exercised a sound discretion in stopping the examination; and order discharged accordingly.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

Messrs. *Ramsay Hendrey & John Christian Kalshoven* carried on business as colonial merchants in *Mark Lane*. On the 28th of June, 1875, they were adjudicated bankrupts, and Mr. *James Crump* was appointed trustee. On the 26th of July they filed their accounts and statement of affairs; and their public examination was fixed for the 5th of August, but was adjourned, for the purpose of affording the trustee an opportunity of examining the bankrupt's books, till the 11th of November. On that day the bankrupt *Kalshoven* alone appeared, his partner being absent in *Canada*. He was examined by counsel on behalf of the trustee, with a view of shewing that the bankrupts had been guilty of fraudulent dealings with the property in the course of their business. For the satisfaction of the Registrar the trustee was examined as to what steps he had taken since the 5th of August to investigate the bankrupt's affairs. He stated that he had sent for both the bankrupts to his office, and had made many inquiries with respect to the estate, but they gave him such indirect and evasive answers that he was not able to follow the inquiry, and could get nothing from them.

After the public examination of the bankrupt *Kalshoven* had

proceeded some time, the Registrar stopped the examination, considering that the most convenient course was to adjourn the examination, in order that the trustee might deliver written requisitions to the bankrupt on the points on which he wished for information, and that the bankrupt might give written answers to them. The trustee protested against this course, claiming his right to continue the public examination of the bankrupt, but the Registrar, considering that the further prosecution of the examination would be a waste of public time (1), made the following order:— That the examination should be adjourned to the 2nd of December, and that the trustee should within fourteen days deliver to *Kalshoven* requisitions in writing to be answered by him, such requisitions to set out in what particulars the trustee required the bankrupts' accounts to be amended, and also such further information in reference to the accounts, or to any estate alleged not to be disclosed by the bankrupts, as the trustee might require. From this order the trustee appealed.

*De Gea*, Q.C., and *Lanyon*, for the Appellant:—

The 19th section of the *Bankruptcy Act*, 1869, provides “that the bankrupt shall produce a statement of his affairs to the first meeting of his creditors, and shall be publicly examined thereon, on a day to be named by the Court, and subject to such adjourned public examination as the Court may direct.” The object of the Act was, that dealings suspected of being fraudulent should be publicly inquired into for the benefit of the commercial community; and it is evident that the truth will generally be more certainly arrived at by such an examination than by a private examination. But the practice has recently grown up of having these examinations conducted in private, and if that is acquiesced in, all the evils of the old practice will be again introduced. It is the right of the trustee to demand a public examination, and the Court will, at his request, adjourn it as often as may be necessary, to obtain a full disclosure of the bankrupt's affairs: *Ex parte*

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(1) The Registrar stated his view of the practice as follows:—“The usual course is to have these examinations at a private sitting for the convenience of the Court, and for the purpose of saving

public time; but if the parties insist upon a public examination, they are entitled to it, though it may be a loss of time to other people.”

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*Milne* (1). In the present case the trustee had done all in his power to obtain information from the bankrupts beforehand. The only reason given by the Registrar for a different course was, that the public time would be saved by taking the examination in private. There is no power in the Court to order the trustee to file written requisitions; and the only effect of filing them would be that a fraudulent bankrupt would have the opportunity of concocting an answer, and evading the charges against him.

*Finlay Knight*, for the bankrupt:—

There was no intention on the part of the Registrar to shield the bankrupt from a public examination. When the replies to the requisitions have been made the bankrupt will again be brought up for public examination, and may be cross-examined upon them. It is only a convenient mode of calling the bankrupt's attention to the points on which discovery is required. The 96th section of the *Bankruptcy Act*, 1869, and Rule 49 of the *Bankruptcy Rules*, 1870, give the Court full power to examine the bankrupt either *vivâ voce* or by written interrogatories, independently of the public examination. It is the duty of the trustee to get every information he can as to the accounts before examining the bankrupt on them in public; otherwise the bankrupt may be taken by surprise, and be unable to give satisfactory answers: *Re Lawrence* (2). And if the trustee does not do this, it is the duty of the Court to order the attention of the bankrupt to be directed to the special points on which information is required.

COCKBURN, L.C.J.:—

I am of opinion that this order must be discharged. Even supposing that the Registrar had the jurisdiction contended for, it seems to me that this was not a case in which, in the exercise of a sound discretion, he ought to have exercised it. It is not a case in which the bankrupt had manifested any difficulty in answering, either from want of memory or otherwise, or had been pressed by cross-examination and unable to give the information asked for. In such a case it might be right to give him an opportunity of consulting his books. In the present case fraud was

(1) 28 L. T. (N.S.) 175.

(2) 22 L. T. (N.S.) 246.

11/16/73 55-21/10/73 435.

alleged, and it was just such a case in which it might be dangerous to give the bankrupt the opportunity of concocting a false answer.

JESSEL, M.R. :—

I am of the same opinion. I can find no power, either in the Act or in the Rules, to impose upon the trustee the trouble of preparing written requisitions for the examination of the bankrupt. I think, therefore, that the Registrar exceeded his jurisdiction in making the present order. I do not say that the Court of Bankruptcy, or any other Court of Justice, has not the power to adjourn an examination in order to enable a witness to obtain fair means of answering the questions put to him. I think such a power is incident to the due administration of justice. If no fraud had been alleged, and the bankrupt had been examined about complicated accounts, and was not able to answer the questions, it might be right for the Court to adjourn the examination, and desire the cross-examining party to give notice to the bankrupt of the information that he desired. But this was not what was done. And in a case where fraud was alleged, and where the examination did not refer to any complicated accounts, but to simple matters as to whether certain debts had been paid, and what had become of the proceeds, and whether certain persons were really creditors of the estate, I can see no good reason for making such an order. But I can see very good reasons why particulars should not be furnished beforehand of the questions which the trustee desired to put. It might have the effect of giving the bankrupt the opportunity of inventing false answers, and time to go to alleged creditors and debtors and arrange with them some fraudulent scheme for baffling justice. I think, therefore, the order must be discharged.

MELLISH, L.J. :—

I am of the same opinion. The 19th section requires the examination to be in public. The trustee has a right to examine the bankrupt in public, and it is also his duty to prepare for the public examination by examining the bankrupt in private, in order to prevent the expense of repeated adjournments and the

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waste of public time. But there was in the present case no evidence before the Registrar that the trustee had omitted to make proper inquiries in private, and as far as appears, the bankrupt was being properly examined respecting specific matters stated in the accounts; and I can see, therefore, no reason for the Registrar stopping that examination. It is quite unnecessary to consider whether, if the trustee 'felt that he could not get the information he required from the bankrupt, the Court ought not, at the request of the trustee, to order written questions to be put to the bankrupt. But I cannot find that the Registrar had any authority to interrupt the public examination by ordering the trustee to make written requisitions, and I agree that even if he had such authority, this was not a proper case in which to exercise it.

BAGGALLAY, J.A.:—

I am of the same opinion. I give no decided opinion whether, under other circumstances, the Court would have power to make such an order. It is, I think, the duty of the Court to see that the conditions required by the Act and Rules are complied with, and for that purpose, if necessary, to adjourn the public examination from time to time; and I am far from thinking that it might not be right in some circumstances to require written questions and answers. But here it was not pretended that there were any such special circumstances; the bankrupt had been examined privately by the trustee, and had given evasive answers; and the only reason alleged by the Registrar for making the order was to avoid the waste of public time. Therefore, even if the Registrar had authority to make such an order, I do not think he exercised a proper discretion in making it.

Solicitors for Appellant: *Hollams, Son, & Coward.*

Solicitor for Respondent: *J. Holmes.*

## HOUSEMAN v. HOUSEMAN.

[1874 H. 220.]

*Practice—Staying Suit—No Title in Plaintiff—Costs.*

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Jan. 22.

When the Plaintiff is, after decree, found to have no title, the suit may be stayed on the application of a person who had been served with notice of the decree.

Where letters of administration are revoked the administrator will not get his costs of an administration suit instituted by him with knowledge that another person claimed to administer.

Order of *Malins* V.C., varied.

THE Plaintiff, *John Houseman*, had, as uncle of *Solomon Houseman*, obtained letters of administration to the estate of *Solomon Houseman*, and had filed the bill in this suit, and obtained a decree for administration of the estate. *Elizabeth C. Houseman*, who alleged herself, and was afterwards proved to be the daughter of *Solomon Houseman*, was served with notice of the decree. The letters of administration granted to *John Houseman* were afterwards revoked, and administration was granted to *Elizabeth C. Houseman*. She then took out a summons to stay proceedings in the suit. The Vice-Chancellor *Malins* made an order that all proceedings should be stayed; and that *Elizabeth C. Houseman* should, out of the moneys in her hands as administratrix, pay the costs of the application, and should also pay the Plaintiff his further costs in the suit not exceeding £20.

*Elizabeth C. Houseman* appealed.

*Glasse*, Q.C., and *G. C. Price*, for the Appellant:—

There is no reason why the administratrix should pay these costs. No doubt the Plaintiff was administrator, but he knew of the claims of *Elizabeth C. Houseman*, and there was no occasion for him to file this bill. There was not in this case any property which needed protection.

*Higgins*, Q.C., and *Freeling*, for the Plaintiff:—

We do not object to the order as it stands, but if it is to be

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interfered with, then we say that the application was irregular and ought to have been dismissed with costs. Miss *Houseman* is not a Defendant, and has only been served with the decree. She ought either to have appealed from the decree, or have filed a bill of review: *Morgan's* Chancery Acts and Orders (1); *Ellison v. Thomas* (2). At all events the Plaintiff should have his costs. In a creditor's suit, the decree is good, and the Plaintiff gets his costs though he does not prove his debt. *Douglas v. Cooper* (3) was a very similar case, and there the Plaintiff had his costs.

JAMES, L.J. :—

It seems to me that the Plaintiff was well warranted in taking out letters of administration, believing himself to be next of kin. But before the bill was filed he had ascertained that there was a person claiming to be the intestate's widow. If he then took proceedings, they were *suo periculo*, and he did take proceedings, knowing that his right might at any moment be determined. His right as Plaintiff was displaced by the Court of Probate. The administratrix then said that she wanted the suit stayed, and without loss of time took out a summons accordingly. The Plaintiff ought to have submitted to have such an order made in Chambers. The order made must be varied, and must be that proceedings are to be stayed, and the applicant is to have her costs of staying the proceedings and of the appeal.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Appellant: *Pilgrim & Phillips*.

Solicitor for Respondent: *W. H. Marshal*.

(1) 4th Ed. p. 197.

(2) 1 D. J. & S. 18.

(3) 3 My. & K. 378, 382.

*Ex parte BURRELL. In re ROBINSON.*

*Composition—Surety—Secret Agreement by Debtor to indemnify Surety—Failure by Debtor to pay Composition—Subsequent Liquidation Petition—Validity of Resolutions—Registration of Resolutions—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 125, 126, 127—Bankruptcy Rules, 1870, r. 295.*

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C. J. B.  
Nov. 15, 22.  
1876  
C. A.  
Jan. 27.

The creditors of a debtor resolved to accept a composition payable in three instalments, the third instalment being guaranteed by a surety. Before the resolution was passed, the debtor had agreed with the surety to indemnify him against any liability which he might incur under his guarantee by depositing goods with him. This agreement was not made known to the creditors. After the resolutions were registered the surety accepted bills of exchange for the amount of the third instalment of the composition, and certain goods were deposited with him by the debtor. The debtor paid the first instalment, but failed to pay the second, and thereupon he filed a liquidation petition. Afterwards the surety paid the third instalment:—

*Held* (affirming the decision of the Chief Judge, who had reversed the decision of the County Court Judge), that the agreement with the surety was valid, and that he was entitled to retain the goods as against the trustee under the liquidation.

The distinction between composition and liquidation by arrangement explained.

ON the 24th of January, 1874, *T. M. Robinson*, a woollen manufacturer at *Leeds*, filed a liquidation petition. His statement of affairs shewed that his unsecured debts amounted to £8073 3s. 5d., and that his assets amounted to £3516 7s. The first meeting of the creditors was held on the 11th of February, 1874, when it was resolved that a composition of 7s. 6d. in the pound should be accepted in satisfaction of the debts due to the creditors. The composition was to be payable as follows: 3s. 6d. in three months, 2s. in six months, and 2s. in nine months; the first two instalments to be secured by the acceptances of the debtor, and the last by the bill of the debtor drawn upon and accepted by *Anthony Robinson*, a grocer at *Leeds*, all the bills to be dated the 24th of January, 1874. These resolutions were confirmed at the second meeting of the creditors, held on the 21st of February, 1874, and were afterwards duly registered. *Anthony Robinson* was the debtor's brother, and he was a creditor for £863 6s. 10d., for

Statement.

*24th Jan. 1874*  
*16th Dec. 1873*  
*16th Dec. 1872*  
*18th Dec. 1870*  
*609*



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which he held the security of a life policy, the value of which was estimated at only £20. He did not attend either of the meetings. Before the meeting was held the debtor told him that he intended to offer a composition to his creditors, and asked him to promise to guarantee the payment of the last instalment. *Anthony Robinson* refused to do so, except on the condition that the debtor would give him security to the full extent of the amount which he might be called upon to pay under his guarantee, and ultimately the debtor promised that he would deposit with him cloth of a value sufficient to cover the amount of the guarantee. This arrangement was not communicated to the creditors, and when the resolutions were passed and confirmed the creditors were entirely ignorant of it. After the registration of the resolutions the acceptances for the three instalments were signed and delivered to the creditors, but *Anthony Robinson* refused to sign the acceptances for the third instalment until the cloth in question, valued at £789 12s., had been actually deposited with him by the debtor. This was done on the 24th of February, 1874, and on the 17th of March, 1874, a deed, bearing date the 24th of February, 1874, to carry out the provisions of the composition, was executed by *Anthony Robinson*.

The first instalment of the composition was duly paid. When the second instalment became due the debtor was unable to meet the bills which he had accepted for it; and on the 29th of July, 1874, he filed a second liquidation petition. His statement of affairs shewed that he had no creditors but those to whom the second and third instalments of the composition remained due. The first meeting of the creditors under this petition was held on the 14th of August, 1874, when it was resolved that the debtor's affairs should be liquidated by arrangement, and *W. H. Burrell* was appointed trustee. Only three creditors attended this meeting. The resolutions were afterwards duly registered.

When the third instalment of the composition, amounting to £829 13s. 9d., became due, it was paid to the creditors by *Anthony Robinson*. In July, 1875, the trustee under the second liquidation applied to the County Court for an order that *Anthony Robinson* should deliver up to him the cloth which had been deposited

with him, on the ground that it formed part of the debtor's estate. The Judge ordered it to be delivered up accordingly (1).

(1) The material portions of the judgment of the County Court Judge (Mr. Daniel, Q.C.) were as follows:—

I am unable to see that the judgment or any of the reasons of the Lord Justice James in *Ex parte Sydney* (Law Rep. 10 Ch. 208) establish the proposition contended for, that, where a composition has been duly made and is in force against a debtor, he is disqualified from presenting another petition for liquidation, so that any proceeding under such a petition must be void. As it seems to me, the decision merely amounts to this, that if a debtor presents a second petition for liquidation while a composition under a former petition is in force, any resolutions which may be passed under such second petition, which interfere with the rights of creditors under the existing composition, may be refused registration, and thereby be rendered inoperative. But if the resolutions under the second petition are registered, and no creditors whose rights may be affected by them complain, the judgment in *Ex parte Sydney* does not establish that such resolutions are not effective. In the present case no creditors have complained or now complain, but, as it appears, the creditors support the resolutions. And this view of the effect of the decision in *Ex parte Sydney* is not opposed by the subsequent case of *Ex parte Russell* (Law Rep. 10 Ch. 255). [His Honour stated the effect of that decision, and proceeded:—]

In the present case there is no dissentient minority. The resolutions have been duly registered, and the objection is raised by a third party as an objection to the jurisdiction. Now, although in this case the proceedings under the first liquidation are not

closed, as they were in *Ex parte Russell*, and in that respect this case is similar to *Ex parte Sydney*, yet here there are not any new creditors whose rights might conflict with those of the old creditors, so that whatever subsequently acquired assets there are would be available for the old creditors, and, as those creditors might have proceeded to make the debtor a bankrupt under the 126th section of the *Bankruptcy Act*, 1869, I think they are at liberty, if they consider it for their interest to do so, to adopt and sanction the debtor's proceedings under this second petition.

In *Ex parte Russell*, Lord Justice Mellish, applying himself, no doubt, to the circumstances of that case, says, "If the creditors under the first liquidation had discharged the future acquired assets, then it appears to me that the subsequent creditors must be, of course, entitled to the future assets, and must be entitled to proceed in bankruptcy; if they are entitled to proceed in bankruptcy, I do not see why the debtor, having assets and having creditors, should not be allowed to present a petition for liquidation, if the majority of the creditors thought fit to have his estate distributed in the ordinary way of liquidation." Now the principle to be extracted from these two decisions I consider to be this, that there is not any merely technical objection to a debtor presenting a second petition for liquidation; but if he does, and resolutions are passed under that second petition, which prejudicially affect the interests of creditors under the first petition, and any of such creditors object, the resolutions ought not to be registered. If no creditors object to the resolutions

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(1) 12 Ch 260

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—

*Anthony Robinson* appealed to the Chief Judge, and the case came on to be heard on the 15th of November, 1875.

under the second petition they may be registered, and, if registered, I am of opinion that for all purposes of jurisdiction they are good against third parties. That is the case here, and I therefore think the first objection fails. The second objection is upon the merits. [His Honour stated the facts as to the agreement between the debtor and the surety, and continued:—]

The facts, as they are candidly stated by the Respondent, in my judgment, amount in point of law to an admission that the transaction of the deposit of the cloth in question with him by the debtor was fraudulent and void as against the creditors of the debtor, upon three distinct grounds. First, that it was a fraud upon the agreement for the composition; secondly, that it was an act of bankruptcy within the 2nd sub-section of sect. 6 of the *Bankruptcy Act*, 1869, as being a fraudulent transfer and delivery in *England* by the debtor of part of his estate; thirdly, that it was void, at common law and under the statute of *Elizabeth*, as having the necessary effect of defeating and delaying the creditors of the debtor. As to the transaction being a fraud upon the agreement for composition, the debtor, by filing his petition for liquidation, committed an act of bankruptcy available for adjudication, if his creditors at the meeting did not resolve to liquidate by arrangement or to accept a composition, and as a necessary consequence he placed all his property at the disposal of his creditors, and disabled himself from making any disposition of any part of it to their prejudice without their consent. The Respondent knew of the petition being filed, he was a creditor, and received in that character the notice of the first meeting.

He must be presumed to know that, in consenting to become surety for the last instalment of the composition, he was entering into an agreement with the debtor's creditors for the benefit of the debtor, and that he was bound to act in good faith towards them. Good faith in such an agreement required that he should not make any collateral arrangement with the debtor which would affect for his benefit as surety any of the property of the debtor without the creditors' consent. By filing his petition for liquidation, the debtor had placed all his property at the disposal of his creditors, and they had a right to consider all that property as assets which the debtor would use and make available as the means for paying the entire composition. The guarantee of the Respondent for the last instalment was, from the nature of the transaction, a security in addition to the security afforded by the retention and use by the debtor of his existing property. It was not a security to be substituted for a part of the debtor's property without the creditors' consent. This will appear plain if the facts of the case are considered. By the debtor's account laid before the creditors at the meetings he represented that his unsecured debts amounted to £8073 3s. 5d., and his assets to meet them were estimated at £3516 7s., thus shewing an estate of about 8s. 8d. in the pound. These assets included, by particular description, the goods which are the subject of this motion. In proposing a composition of 7s. 6d. in the pound the debtor must be considered as saying to his creditors, "I have truly stated to you the amount of my debts, and given you the particulars and a fair estimate of the value of my assets.



*Little, Q.C., and G. W. Lawrance, for the Appellant:—*

We contend: First. That the trustee under the second liquidation has no title to the goods, the proceedings under that liquidation

They are all at your disposal. I know that you can make me bankrupt, or you can proceed to liquidate by your own trustee; but these proceedings will involve considerable costs, which will reduce the amount to be divided among you. I ask you not to make me bankrupt or to proceed by liquidation, but to leave me in possession of my property, that I may continue my business and realize my assets myself. I offer for your acceptance, in satisfaction of your debts, a composition of 7s. 6d.,” in the terms of the resolution as ultimately passed; and the creditors must be understood as accepting the offer in its very terms. Now these terms require that the Respondent should be a party to them, and should undertake the suretyship offered as to the third instalment in the form offered, namely, by accepting the debtor’s drafts for the amount of that instalment contemporaneously with the debtor’s acceptances for the first and second instalments, both of which will constitute debts which will become due and payable before the debt to be incurred by the Respondent upon his acceptances for the third instalment. The debtor would also be liable to the creditors for the third instalment, as well as the first and second. For these debts thus to be incurred by the debtor, and to be accepted by the creditors in satisfaction of their original debts, the creditors would be entitled to consider that the property left at the disposal of the debtor would be dealt with by him in the ordinary course of business, and for value, and being so dealt with by him, such property, or its proceeds, or their substitutes,

would be assets available for the creditors, and capable of being resorted to by them for enforcing payment by the debtor of the instalments as they became due. And then it follows that any voluntary alienation of his property, or any substantial part of it, by the debtor would necessarily prejudice his creditors, by depriving them of that which they would, but for such voluntary alienation, have been enabled to make available for payment of their debts, and any alienation by the debtor which did not involve the receipt by him of some equivalent for the property alienated, which the creditors might make available, would be voluntary as against the creditors, and in this sense a fraud upon them by the debtor, both under the statute of *Elizabeth*, and also as an act of bankruptcy under the *Bankruptcy Act*, 1869, s. 6, sub-s. 2. On behalf of the Respondent, however, it is contended that, as between him and the debtor, the transaction in question was not voluntary, but founded upon valuable consideration, namely, the liability he had come under for the benefit of the debtor to pay the third instalment, and that he expressly stipulated for the transfer of these goods to him by the debtor as the condition upon which he agreed to become surety, and that, as appears by his affidavit, he refused to sign the acceptances for the third instalment, or to execute the composition deed, until the goods in question had been actually deposited in the custody of a third person to hold for him, and to be at his disposal. But this contention rests upon this foundation, that the debtor was then the owner of the goods, and

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As soon as the debtor made default in payment of the second

had full power of disposition over them ; and the foundation obviously fails, because at the time the debtor had committed an act of bankruptcy available for adjudication by his creditors, and had thereby incapacitated himself from dealing with the property to their prejudice without their consent. All this was known to the Respondent, and the obligation was thus, from the very nature of the transaction, thrown upon him of obtaining the sanction of the creditors to it. This was not done, or attempted to be done ; the communication was perhaps not purposely withheld, but rather perhaps through ignorance, and the Respondent did not consider it necessary. But no man can justify or claim the benefit of a wrong done to another by alleging his ignorance that the law declared it a wrong. *Ignorantia juris neminem excusat*. But, as was well observed by Lord Justice Knight Bruce, in *Pooley v. Quilter* (2 De G. & J. 327), there are some things so obviously opposed to honesty and common sense that a man need not be a lawyer to know that they are wrong. He will know instinctively that they are wrong. And here it must have been obvious to the Respondent, as a man of business and ordinary intelligence, that the transaction he was entering into with the debtor for indemnity, by means of the property of the debtor, was one which, if communicated to the creditors, they would not have assented to—nay, which it would have been the duty of the creditors assembled at the meeting to have rejected in the interest of the absent creditors, because it in effect nullified the offer of the Respondent's

guarantee for the third instalment, the estimated value of the property of the debtor to be taken from the creditors and placed at the disposal of the Respondent for his indemnity being about equal to the estimated amount of the instalment which he undertook to pay. The non-communication, therefore, to the creditors of this arrangement between the debtor and the Respondent, in my opinion, vitiates the transaction as between the Respondent and the creditors, for this is one of those cases in which silence is equivalent to concealment. The principle is thus stated by *Cicero de Off. Lib. 3, c. 13*, in a passage which has been recognised by Lord Mansfield in *Carter v. Boehm* (3 Burr. 1905), and by Vice-Chancellor Knight Bruce in *Nelthorpe v. Holgate* (1 Coll. 203), as authority on the law of England, "*Aliud est celare ; aliud tacere ; neque enim id est celare quid-ñuid reticere ; sed cum, quod tu scias, id ignorare, emolumenti tui causâ, velis eos quorum intersit id scire.*" [His Honour then referred to *Leake v. Young* and *Ex parte Hoare*, and added :—]

Upon the whole I am of opinion that the transaction between the surety and the debtor is void as against the trustee upon each and every one of the three grounds I have mentioned. First, as a fraud in law upon the agreement for composition by reason of its non-communication to the creditors ; secondly, as being a fraudulent transfer in England by the debtor of part of his property, and therefore void as an act of bankruptcy within sect. 6, sub-sect. 2 of the *Bankruptcy Act, 1869* ; and, thirdly, that it is fraudulent and void, both at common law and under the statute of

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instalment of the composition, the creditors had three courses open to them. They might have applied to the Court under sect. 126 to enforce payment of the composition, or they might have asked the Court, under the same section, to adjudicate the debtor a bankrupt, or they might have sued the debtor at law for the unpaid balance of their original debts: *Edwards v. Coombe* (1); *In re Hatton* (2). The only way in which the provisions of a composition, when once agreed upon, can be altered, is by an extraordinary resolution of the creditors as provided by sect. 126.

As to the first point, the argument is, that, so long as the composition under the first petition was pending, the debtor was incapacitated from filing a second petition: *Ex parte Sydney* (3); *Ex parte Russell* (4). All the proceedings, therefore, under the second petition are void, and the trustee has no title. Sect. 127 does not make the registration of the resolutions conclusive in any respect

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*Elizabeth*, as being a transfer of property the necessary effect of which must be to defeat and delay creditors. I have entered at greater length into my reasons for the decision than I should have thought it necessary to do, had I not observed, from this and other cases which have come before me judicially, that a notion seems to have been entertained by some men of business in *Leeds*, that, in compositions under the arrangement clauses, sects. 125 and 126 of the *Bankruptcy Act*, 1869, it is competent for a person, who voluntarily comes forward in the interest of the debtor to guarantee one or more of the instalments of a proposed composition, to protect himself against liability upon his guarantee by a private arrangement with the debtor that the whole, or what, as in this case, may be considered a sufficient part, of the debtor's property should be assigned or made over to the surety so as to be realised by him for his own benefit to an amount sufficient, or as far as it will extend, to repay him whatever sum he may be called upon to pay under his guarantee. All such

arrangements are, in my opinion, void, unless fully communicated to the creditors, freely assented to by those who may attend the meetings, in person or by proxy, and approved of by the Court under the 28th section, so as to bind dissentient and absent creditors. It is hardly possible to suppose that any meeting of creditors, unless influenced by the motive of favouring the debtor at the expense of themselves, or, if proxies, of those whose interests they represent, would ever sanction such a suicidal arrangement; but, if a meeting could be packed for the purpose by creditors willing to befriend the debtor, I am of opinion it would be *ultra vires* and void as against dissentient and absent creditors, and the Registrar would be justified in refusing to register such resolutions. If brought before the Court for approval the Court would be bound to reject them, unless the express assent of every creditor were obtained.

(1) Law Rep. 7 C. P. 519.

(2) Ibid. 7 Ch. 723.

(3) Ibid. 10 Ch. 208.

(4) Ibid. 255.

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but that of mere matters of procedure. The Appellant, who is a creditor as well as a surety, is not precluded by the registration from taking an objection to the resolution, which is in effect that the creditors were acting *ultra vires* in passing them: *Ex parte Browning* (1); *Ex parte Ashworth* (2); *Ex parte Jones* (3).

As to the second point, we say that the agreement for an indemnity was honestly entered into on the part of the surety, and the mere fact that it was not made known to the creditors does not invalidate it. There was no moral or legal fraud in it, and the surety got no benefit by it. He could in no event gain, whereas he might lose, as he has done in fact. The creditors bargained for an additional security in the shape of a guarantee by a surety, and they have got what they bargained for, and the surety has paid the third instalment which the debtor failed to pay. After composition resolutions are passed, the debtor is left complete master of his estate, which he can then deal with in any way he pleases: *Leake v. Young* (4); *Ex parte Sheriff of Middlesex* (5); *Ex parte Birmingham Gaslight and Coke Company* (6); *Ex parte Hoare* (7); *Ex parte Jones* (8).

We say also that the depositing of the goods with the surety did not, as the Judge of the County Court thought, amount to an act of bankruptcy or to a fraudulent disposition under the statute of *Elizabeth*. Full value was given by the surety for the goods, and the deposit was in no sense an assignment to secure a past debt, or a fraudulent preference.

*De Gea*, Q.C., and *Northmore Lawrence*, for the trustee:—

The resolutions under the second petition have been registered, and every one has acted under them. A mere stranger, who has fraudulently got into his possession a part of the debtor's estate, cannot now be heard to say that the resolutions are void, and that the trustee has no title. Sect. 127 was intended to meet such a case as this, and it makes the registration of the resolutions conclusive as to their validity, at any rate as against a stranger.

(1) Law Rep. 9 Ch. 583.

(2) Ibid. 18 Eq. 705.

(3) Ibid. 16 Eq. 366.

(4) 5 E. & B. 956.

(5) Law Rep. 12 Eq. 207.

(6) Ibid. 11 Eq. 204.

(7) Ibid. 16 Eq. 625.

(8) Ibid. 10 Ch. 663.

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Objections to the validity of resolutions may be made before they are registered ; if they are not made then, the registration is conclusive as to jurisdiction : *Bankruptcy Rules*, 1870, r. 295 ; *In re Thorpe* (1).

If, however, the Appellant's case is that he is a creditor, the answer to him is, that he has practically assented to the proceedings under the second petition. *Ex parte Sydney* (2) does not go the length that is contended for by the other side. It was merely a decision that, while a compounding debtor was in default in the payment of his composition, he could not bind his creditors to accept a smaller composition. And there the objection was taken to the registration of composition resolutions under a second petition ; here the resolutions have been registered. A bankruptcy would be perfectly valid, though the bankrupt was in default in paying a composition previously agreed upon ; why not a liquidation, which differs from a bankruptcy only in its machinery ? *Ex parte Russell* (3).

With regard to the second point, our contention is this. The general principle is, that when a man is dealing with his creditors he must have no side arrangement ; the creditors are entitled to know everything about his affairs.

[The CHIEF JUDGE :—Everything which affects their interests. But here the debtor sold part of his estate for its full value, and with the price he paid part of the composition. How did that affect the interests of the creditors ? The composition resolutions left the debtor in full possession of his estate.]

We say it was not a sale for value. Before the goods were delivered to the surety he had entered into an agreement to pay a sum of money.

[The CHIEF JUDGE :—He did pay the sum of money. You cannot have the goods as well as the price of them. The debtor might have sold the goods to any one else.]

This was not a sale for the purpose of paying the composition. What the debtor said to his creditors at the meeting was in effect this : My estate is sufficient to pay a dividend of 8s. 8d. in the pound if it is properly realized, but you will not realize near so

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(1) Law Rep. 8 Ch. 743.

(2) Law Rep. 10 Ch. 208.

(3) Law Rep. 10 Ch. 255.



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 1876      you will allow me to realize the estate, I will pay you a com-  
*Ex parte*      position of 7s. 6d. in the pound in three instalments. But, to  
 BURRELL.      secure you against the contingency of the estate not producing so  
*In re*      much, my brother will guarantee the last instalment. In this way  
 ROBINSON.      you will have an independent person who will make up the de-  
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[The CHIEF JUDGE:—No such thing as that was said, or done, or intended.]

The County Court Judge thought that was the effect of the transaction, and that all the assets ought to have been left with the debtor, to enable him to fulfil his engagement. The cases cited only shew that composition resolutions leave the debtor in possession of his property, subject to all the liabilities to which it was subject at the time when he filed his petition; it has never yet been held that, simultaneously with the composition resolutions, the debtor may create a new incumbrance on the property. The cases shew that after the registration of the resolutions the debtor is left master of his property; they do not shew that he is master of it while the matter is still pending. The agreement with the surety was entered into before the resolutions were passed.

We also say that the deposit of the goods was a voluntary disposition of property made by the debtor without any consideration. The suretyship was not a consideration. *Leake v. Young* (1) shews that. Therefore an act of bankruptcy was committed.

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 C. J. B.

BACON, C.J.:—

It is with the greatest reluctance that I differ from the judgment which has been pronounced by the most learned and patient Judge in the Court below, for whose judgment I have the highest respect, and from whom I should not differ unless I found that the plain facts of the case and the urgency of the law required me to do so.

The case has been argued at very great length, and everything has been said that could possibly, or at least with propriety, be

(1) 5 E. & B. 955. *29m 45.576*

said. The transaction is by no means an extraordinary one. It is admitted that there is not a trace of fraud of any kind in it, that there was no fraudulent representation, and no fraudulent concealment. The only concealment which is suggested is that there was silence with respect to a particular part of the dealing. What was that? I take the learned Judge's description of it from his own judgment. He describes it thus:—[His Lordship read from the judgment of the County Court Judge, quoted above, the passage commencing "By the debtor's account," and ending "accepting the offer in its very terms," and continued:—] and in its very terms it has been fulfilled.

I have had occasion, as I have been reminded this morning, frequently to point out the marked distinction between liquidation and composition. I did so when I first began to exercise this jurisdiction. Composition, as it now stands under the Act of 1869, presented certain features of novelty, and it was, I thought, important to point out the plain and palpable distinction which exists between liquidation by arrangement and composition. Liquidation may be said in general terms to be an equivalent for bankruptcy, giving the creditors the same rights which they have in bankruptcy, and exposing the debtor to the same obligations to which he is liable in bankruptcy. But composition is a totally different thing. All that the law requires from a debtor proposing to compound with his creditors is, that he should state fully what his means are of paying his debts, having first stated truly what is the amount of those debts. And, if the creditors agree to accept his composition, he becomes a free man, entitled to all the rights of ownership and disposition over every part of his property; the creditors relinquish the rights which the law would give them if they proceeded to bankruptcy or liquidation by arrangement, and they are content that the debtor should thenceforward deal with his property in any way he thinks fit. Nothing can be plainer than that. I do not refer to my own decisions, but to those in which the Lords Justices have adopted similar views. The creditors acquire certain plain rights, some of them specified in the Act, and others of them not specified there, but with which we are familiar, such as the right to sue for their original debts on failure of payment of the composition. The creditors are bound

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by the resolutions, and they have all the rights given by the resolutions. The case of *Ex parte Sydney* (1) has decided that those rights cannot be interfered with or altered in any respect by any subsequent dealings of the debtor or by anybody else, and an attempt to make him debtor or to liquidate his affairs by arrangement while the proceedings under the resolutions are pending is against the law, as *Ex parte Sydney* has in plain terms decided.

Then what took place here was this, that the debtor, having paid the first instalment, could not pay the second. But he had performed the third term of his agreement. He had procured a surety to give his acceptances for the third instalment, the creditors had received those acceptances, and when they came to maturity they were paid. Can it be said that the creditors were to have the assets, which were looked to as the means of paying the composition, twice over? Would there be sense or reason in that? If the assets belonged to the debtor, as they did by law, he had a right to deal with them as he chose, and a right to buy from the surety the liability under which he had come. He received from the surety those acceptances which he handed to the creditors; they had the acceptances and the money represented by them. The creditors, having had not only all that they could have had if they had made the debtor a bankrupt when he proposed to compound, but all that by the composition resolutions they stipulated for, now say that they are entitled to more than that, for the debtor, being master of his property, has applied part of it for the purpose of securing to them the third instalment which he promised to pay. Nothing can, in my opinion, be more repugnant to justice and common sense than the claim at present set up.

Then it is said that this transfer to the surety was an act of bankruptcy. It is quite new to me to hear that an act of bankruptcy can be committed by a man who parts with his goods for valuable consideration, not a shilling less than their value. It is new to me to hear that the statute of *Elizabeth* can be said to prohibit a transaction by which a man sells or parts with his goods, in order that with the proceeds of them his creditors may be paid. If I were to consider the case in that point of view I should say

(1) Law Rep. 10 Ch. 208.

that there was nothing more unreasonable than the application which is now made, that the creditor, who gave the security and who has paid the money, should restore the goods which he bought with the money he paid. Neither the law as to acts of bankruptcy, nor the statute of *Elizabeth*, has any application whatever to such a case.

Then it is said that this is an improper transaction because it was not disclosed to the creditors. That it was not disclosed is not a fact which is disputed. But to what end should it be disclosed? The rule which vitiates a composition on the ground that faith has not been kept with the creditors has no application to this case. Where is the want of good faith, or the concealment of a fact which would have bettered or altered the position of the creditors if it had been known? What advantage did the surety derive from this? He gave his money for goods worth so much money. The creditors have had every particle that could be produced by the assets.

Upon these grounds I do not think that the order can be sustained, if there was no other objection to it. But I cannot disregard the argument which has been addressed to me founded on the principle recognised in *Ex parte Sydney* (1). That this Court has power to look over and to rectify, if wrong, any resolution that has been passed, at whatever time and under whatever circumstances, I should be very sorry to express the slightest doubt. The authorities which have been referred to shew that the Court will consider resolutions *ultra vires* if part of them are not such as it is within the power of the creditors to pass, and will rectify them by striking out the vicious parts and leaving the others. I do not want authority for that, for if any one entertains a notion that the power of this Court to overhaul any transactions which have taken place under resolutions, whether under the 125th or 126th sections, can be crippled or interfered with, I am not that one, and I shall not be the first to express a doubt upon that subject.

The objection seems to have been taken before the learned Judge of the County Court, and it has been insisted on here on the part of the Appellant, that his rights as a creditor under the composition deed could not be interfered with by the resolutions which

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were afterwards passed and registered. The learned Judge seems to have thought that resolutions having been once passed were binding at all times, and for all purposes, and that, as there were resolutions to liquidate by arrangement, therefore the rights of the creditors must go on as if no anterior transaction had taken place. That would be a most dangerous and lamentable state of the law. I think that the learned Judge should have drawn from the case of *Ex parte Sydney* (1) the conclusion contended for on the part of the Appellant, and should have said that this debtor, who has paid one instalment, and, by means of the goods delivered to the surety, has procured money to pay the third, shall not be heard to come here with all the rights the statute gives him, and by this trick (for I do not hesitate to say that I consider it is a mere trick) try to upset the effect of the first set of resolutions, and to enforce against a man whose conduct seems to have been perfectly fair and perfectly honest, and within the law, so heavy a penalty as to make him pay twice over the value of the goods which he has received under these circumstances. In my opinion, upon the law and upon the merits and the morals of the case, if it is necessary to consider them, the Appellant is perfectly right in asking that the order made against him may be rescinded, and I so order.

C. A. From this decision the trustee appealed, and the appeal came on to be heard before the Court of Appeal on the 27th of January, 1876.

Argument

*De Gex*, Q.C., and *Benjamin*, Q.C. (*Northmore Lawrence* with them), for the Appellant:—

Without imputing any intentional fraud to the debtor or his surety, we contend that the debtor made, and the surety acquiesced in, a representation to the creditors that the assets were unincumbered and were all at the disposal of the creditors for payment of their debts. This representation was made in the debtor's statement of his assets submitted to his creditors, and must be considered to have been continued till the resolutions were passed. The resolutions were passed on the faith of this representation, and the debtor is bound to make it good. Why was the surety to be for the last instalment rather than the first? Surely because

(1) Law Rep. 10 Ch. 208.

the creditors understood that the first two would be paid out of the assets, and that if there was any deficiency, it would be after the assets had been exhausted. They looked both to the assets and the surety, and they are entitled to have both; the surety is no surety at all if he pays the instalment out of the debtor's assets.

[MELLISH, L.J.:—If the creditors agreed to the resolutions under a misunderstanding, they ought to apply to have them set aside and the surety discharged.]

We do not desire to do that. We are entitled to carry out the resolutions, and to hold the debtor to make good the representation on the faith of which they were passed.

*Little, Q.C., and G. W. Lawrance*, for the surety, were not called on.

JAMES, L.J.:—

I am of opinion that there is no ground for this application. It was admitted, in fact, in the argument that, standing upon the resolutions for the composition alone, there was nothing whatever to prevent the compounding debtor doing whatever he liked with the assets. He had bought the assets from his creditors by means of two acceptances of his own and a third acceptance of his brother. He was absolute master of those assets in exactly the same way as any other purchaser. They were minded to take that consideration, and they took it. Then it is said: "We took that consideration, and gave you the assets upon the concealment of a fact which ought to have been disclosed. But even if that be so, their remedy is to apply to have the whole of the composition resolutions set aside. I cannot see how they can have a right, standing upon the composition resolutions, to avail themselves of any misstatement by which they say they were induced to enter into it; and if not, the whole case seems to me to fail. The appeal must be dismissed with costs.

MELLISH, L.J.:—

I am of the same opinion. The only ground on which this appeal can be supported is, that the surety was a party to making a representation to the creditors that the assets were unincumbered, and that that representation was untrue, and that the

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Court will hold him to the truth of that representation by taking the assets which were given as security to the surety. The first answer to be given to that argument is that he made no such representation. The debtor made a statement of his assets. At the time he made that statement the representation was perfectly true. It is unnecessary to consider whether the surety was a party to it or not, because the representation was true; the assets were at that time entirely unincumbered. Then the assets being unincumbered, a bargain is to be made for a composition. The creditors might, if they pleased, have made it part of the bargain that the assets, in whole or in part, should be assigned to the trustee as security for them, or they might have made it part of the bargain that no part of the assets should be assigned to the surety; but instead of doing that, they come to a resolution that they will accept this composition, the third instalment being secured, leaving the debtor perfectly at liberty to deal with the assets in any way he pleased. They did not make it any part of the bargain that the assets should be dealt with in any particular way.

It is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact, which is untrue, and a promise to do something in future, and to consider what the bargain is. Here, it seems to me that all the representations made to the creditors are perfectly correct, and the only question is, what is the bargain that was made between the creditors, the debtor, and the surety at that time. The bargain was that they will take their debts payable in three instalments, the last instalment being secured. It was made no part of the bargain that the assets, or any part of the assets, should not be assigned to the surety as security, and it not being made part of the bargain the debtor is left perfectly at liberty to deal with them as he thought fit.

I also agree with the second ground, which the Lord Justice has referred to, namely, that even if they could set aside the agreement, they must at the same time set aside the whole composition.

BAGGALLAY, J.A.:—

I am of the same opinion. By the 126th section of the *Bank-*

*ruptcy Act*, 1869, which is the section regulating these compositions, it is provided that the bankrupt "shall attend at both the meetings at which the extraordinary resolution is passed, and shall answer any inquiries made of him." It was perfectly competent to any of the creditors who were present to have inquired of him whether there was any charge affecting the assets, which he treated in the statement brought before the meeting as belonging to him. Then, having had the opportunity of examining him, they proceeded to pass two resolutions. The first resolution is to the effect that they will accept 7s. 6d. in the pound in full satisfaction of the debts due. The second resolution provides for the nature of the security they are to have for that composition, the nature of the security being that it is to be secured by payments of three instalments of 3s. 6d., 2s., and 2s., and the first two instalments are to be secured by the acceptance of the debtor, and the third by a bill drawn upon and accepted by the surety. Therefore, in point of fact, these resolutions describe the particular security to be given to the creditors. It was open to them at that time to have passed a third resolution, or any additional number of resolutions, by which provision should be made for the property of the debtor being assigned by way of further security for the payment of these instalments, but no such resolutions were passed.

I note the observation of Mr. *Benjamin*, that the creditors do not want to set aside the composition. All they want is to have effect given to the composition according to the representation made to the meeting. Is that anything else than asking for the specific performance of the provisions of those written resolutions added to by something else, and not only added to, but to some extent departed from, by something which passed in the verbal conversations that occurred between the parties? It appears to me that the decision of the Chief Judge is the right conclusion to arrive at.

MELLOR, J.:—

I am entirely of the same opinion. I think the circumstances altogether preclude Mr. *Benjamin's* argument. I do not think there is anything in the statement of facts, so far as I understand them, to give rise to that argument. It seems to follow the

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*Ex parte*  
BURRELL.*In re*  
ROBINSON.

Judgment, C. A.

7th D. 619



C. A.

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*Ex parte*  
BURRELL.*In re*  
ROBINSON

Judgment, C. A.

ordinary rule of an ordinary composition, in which by the bargain made with the debtor he is released and becomes a free man. unless there is something special in the circumstances—some fraud or misrepresentation; and there is no colour for that here, for according to the judgment of the Chief Judge in Bankruptcy, there was nothing but silence. There was no fraud and no misrepresentation.

Solicitors for Appellant: *Paterson, Snow, & Burney*, agents for *Joseph Walker, Leeds*.

Solicitors for Respondent: *Torr & Co.*, agents for *Middleton & Sons, Leeds*.

C. A.

1876

Jan. 28.

*Ex parte* MONTAGU. *In re* O'BRIEN.

*Bankruptcy—Order and Disposition—Equitable Assignment of Goods—Claim of Possession by Creditor.*

A debtor on the eve of insolvency being pressed for payment by a creditor, wrote a letter purporting to transfer to him 500 tons of coals lying at his wharf, the proceeds of which he agreed to hand over to the creditor till his debt was discharged.

On the following day the debtor filed a petition for liquidation. The next day the creditor, not having heard of the filing of the petition, but suspecting that the debtor was insolvent, made a formal demand for the coals, and sent a man to take possession of them, who was forcibly ejected by the debtor. The letter was registered under the *Bills of Sale Act*, and a resolution was afterwards passed by the creditors agreeing to a liquidation:—

*Held*, that the letter operated as an equitable assignment of the coals, and although it was intended by the parties that the coals should remain in the possession of the debtor, yet the creditor had a right to demand possession of them if he suspected the insolvency of the debtor; and that when that was done they ceased to be in the order and disposition of the debtor with the consent of the true owner.

THIS was an appeal from an order of Mr. Registrar *Hazlitt*, sitting as Judge in Bankruptcy.

*John Francis O'Brien* was a merchant carrying on business in London under the style of *O'Brien & Co.* In the month of August, 1875, he became indebted to the firm of *S. Montagu* on a bill of exchange for 7628 Italian lire (equal to £283), of which *O'Brien* was the drawer.

30th D 72-3  
— 800  
5th D 40

On the 17th of August, *Montagu* applied to *O'Brien* for payment of the bill, and threatened to take legal proceedings if he did not either pay it or give security for it.

*O'Brien* then offered to pay £100 on account, and to make over, as collateral security for the balance, the proceeds of the sale of 500 tons of coal which he stated he had at his wharf. These terms being agreed to, *O'Brien* wrote and signed the following letter:—

“56, Old Broad Street,  
“17th August, 1875.

“Messrs. *Samuel Montagu & Co.*

“Sirs,—In consideration of your delaying legal proceedings in respect to a returned bill of Lire 7628, I hereby transfer to you 500 tons of coals which are on my wharf, the proceeds of which coals shall be handed to you till my debt to you is liquidated.

“I also engage to pay you £100 to-morrow.

“I remain, &c.,

“*John F. O'Brien.*”

On the 18th of August *O'Brien* filed a petition for liquidation, but *Montagu* had no notice of the filing of the petition until after the 19th of August.

*O'Brien* did not pay the sum of £100 the next day as agreed, and in consequence, *Montagu* being alarmed as to the solvency of his debtor, wrote through his solicitors, on the 19th of August, a formal demand of possession of the coals. On the same day he sent a porter and a clerk to *O'Brien's* wharf to take possession of the coals lying there. The two men took formal possession of the coals, and one of them remained there till the evening, when he was forcibly ejected by *O'Brien's* agent.

It was admitted that the letter was intended to cover the whole of the coals at the wharf.

After this, resolutions agreeing to a liquidation were passed and registered.

The letter of the 17th of August was registered by *Montagu* under the *Bills of Sale Act*. He then applied to the Registrar for an order directing the trustee to pay to him all moneys received by him as the proceeds of the sale of the 500 tons of

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*Ex parte*  
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C. A. coals. The Registrar refused the application, and *Montagu* appealed from this decision.

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*Moulton* (Davey, Q.C., with him), for the Appellant :—

The letter operated as an equitable assignment of the coals at the wharf; and although it might be intended by the parties that *O'Brien* should sell them for his creditor, yet his creditor had a right at any time to demand possession; and he having done so, it is impossible to say that the goods were in the debtor's order and disposition with the consent of the true owner.

If the letter did not operate as an assignment of the coals, it was at least a specific appropriation of them to answer our debt.

*De Gex*, Q.C., and *Bagley*, for the trustee :—

No right to the possession of the coals passed by this letter. The clear intention of the parties was that *Montagu* should not have possession of them, but that *O'Brien* should keep them, and account for the proceeds. Therefore *Montagu* was not the true owner of the goods, and he was a mere trespasser in attempting to take possession of them.

JAMES, L.J. :—

In my opinion the order of the Registrar in this case must be discharged. The question really depends upon the meaning of the letter of the 17th of August, 1875. That letter amounts to an equitable transfer of the 500 tons of coals on his wharf, and an equitable declaration of trust as to the proceeds. *O'Brien* says : "The goods are to be yours, and I undertake to sell them for you, and account to you for the proceeds." Then *Montagu* becomes alarmed as to the solvency of his debtor, and writes a formal demand for possession of the coals, and sends two men to take possession of them. It is impossible to say after that they were in the order and disposition of the debtor with the consent of the true owner.

MELLISH, L.J. :—

I think the letter constituted a perfectly good equitable transfer

of the coals. It is true that it shewed an intention that the debtor should be the person to sell the coals, and that he should account for the proceeds to the creditor. But I have no doubt that *Montagu* was entitled to demand possession of the goods, for the express purpose of preventing them from being in the order and disposition of the debtor with the consent of the true owner within the meaning of the statute. The order of the Registrar must be discharged.

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BAGGALLAY, J.A.:—

I concur.

MELLOR, J.:—

I also concur. I think that everything was done by *Montagu* that he could do to get possession of the goods.

Solicitors for Appellant: *Hill & Son.*Solicitors for Respondent: *Lewis, Munns, & Longden.**Ex parte* DITTON. *In re* WOODS.

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1876

*Bankruptcy—Jurisdiction—Injunction—Judicature Act, 1873, s. 24, sub-s. 5—  
Judicature Act, 1875, s. 9—Creditor holding Security.*

Feb. 3.

The power of the Court of Bankruptcy to restrain suits in other Courts by injunction is untouched by the *Judicature Act, 1873, s. 24, sub-s. 5*, and remains as before the passing of the Act.

An order was made in the *London Court of Bankruptcy* restraining an equitable mortgagee of certain property of a bankrupt from proceeding in a foreclosure suit against the trustee, and ordering him to give up the deed to the trustee, and concur with him in selling the property; and that on completion of the purchase the sum claimed by the mortgagee should be paid into the Court of Bankruptcy. On appeal the Court varied the order, directing that the mortgagee should not give up the deed till payment into the Court of Bankruptcy of the amount claimed by the mortgagee.

3CLD 460  
11CLD 56  
14CLD 3

THIS was an appeal from an order of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.



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*Ex parte*  
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*In re*  
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—

Messrs. *W. Woods, E. G. Woods, and H. Woods*, carried on a proprietary club, called the *City United Club*, in *London*. On the 1st of April, 1875, they deposited the lease of the premises with their solicitor, Mr. *A. G. Ditton*, to secure an advance of £220, giving him at the same time a memorandum charging the property with £220, with £7 per cent. interest, and also with the costs incurred by him on their behalf up to that date. Out of this sum of £220, £180 were applied in paying a composition to the creditors of Messrs. *Woods*, who were then in pecuniary difficulties.

On the 13th of July, 1875, Messrs. *Woods* were adjudicated bankrupts on the petition of certain others of their creditors, and on the 29th of July Mr. *W. Edwards* was appointed trustee in their bankruptcy.

The trustee entered into a contract, which he considered a very advantageous one, for the sale of the bankrupts' premises. On the 10th of September Mr. *Ditton* filed a bill in Chancery against the trustee, praying for a declaration that the memorandum of the 1st of April, 1875, constituted a good equitable security for the sum advanced, and for the costs then due, and that the Plaintiff was entitled to a lien on the lease in respect of all further costs due to him from Messrs. *Woods* between the date of the memorandum and the day when they were adjudicated bankrupts; and praying for foreclosure or a sale of the property comprised in the lease.

On the 7th of December the Registrar, on the application of the trustee, granted an injunction restraining *Ditton* from taking any further proceedings in the suit, and ordering him to deliver up the lease to the trustee; and that the trustee should be at liberty to proceed with the sale of the property, and to hand over the lease to the purchaser; and that after completion of the sale the trustee should out of the purchase-money bring into Court the sum of £1270, the amount claimed by *Ditton* as due to him for money advanced, costs, and interest, to abide the result of any application to be made by him. From this order *Ditton* appealed.

*De Gex, Q.C., and Warmington*, for the Appellant:—

In the first place we contend that the Court of Bankruptcy has now no jurisdiction to make an order restraining proceedings in a

branch of the High Court of Justice. By the 3rd section of the *Judicature Act*, 1873, the *London Court of Bankruptcy* was made part of the Supreme Court of Judicature, and by the 24th section, sub-sect. 5, it is enacted that no cause or proceeding pending in the High Court of Justice or in the Court of Appeal shall be restrained by injunction or prohibition, but that application should be made to stay proceedings in the branch of the Court in which the case is pending.

It is true that by the 9th section of the *Judicature Act*, 1875, the part of the 3rd section of the previous Act relating to the *London Court of Bankruptcy* was repealed, and it was enacted that the *London Court of Bankruptcy* should not be united or consolidated with the Supreme Court of Appeal; but the 24th section still remains in force, and applies to all causes pending in any branch of the High Court of Justice. The trustee ought, therefore, to have applied to the Chancery Division for an order staying proceedings in the suit.

[MELLISH, L.J.:—If the alteration made by the 9th section of the *Judicature Act*, 1875, had not been made, the County Courts acting in Bankruptcy would have retained their power of granting injunctions, while the *London Court of Bankruptcy* would not.]

But we also contend that upon the merits this is such an order as the Court ought not to have made. The Court of Bankruptcy has never been in the habit of restraining a secured creditor from realizing his security. A mortgagee has always a right to enforce all his remedies: *White v. Simmons* (1). Such an order as that a mortgagee should give up the deeds to the mortgagor or his trustee, that he may conduct the sale of the property, has never been heard of. We have a right to keep the deeds till our debt is paid: *Chichester v. Marquis of Donegall* (2). The present contract for sale may never be completed, and then we shall have lost our security.

*Winslow, Q.C., and Bigham, for the trustee:—*

We do not seek to deprive the mortgagee of his deed. If he

(1) Law Rep. 6 Ch. 555.

(2) Law Rep. 5 Ch. 497.

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*Ex parte*  
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C. A. will undertake to produce it to the purchaser, and to join in the conveyance, we shall be satisfied.

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*Ex parte*

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*In re*  
WOODS.

JAMES, L.J.:—

The order certainly goes too far. The only order the Court can make is, that, upon payment into the Court of Bankruptcy of the sum of £1270, the Appellant do concur with the trustee in assigning the property to the purchaser, and deliver up the lease to him. The Appellant may add his costs of the appeal, and in the Court below, to his security.

But as to the question of jurisdiction, it is very important that it should be clearly understood that there is no doubt whatever that the jurisdiction of the Court of Bankruptcy to restrain proceedings in other Courts still exists. Taking the two Judicature Acts together, it is quite clear that there is nothing in them which interferes with the jurisdiction of the Court of Bankruptcy as it existed before the Acts. The 24th section of the Act of 1873 only provides rules for the manner in which the High Court of Justice shall carry on its own proceedings. It leaves the Court of Bankruptcy entirely untouched.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Wild, Barber, & Browne; Pritchard, Englefield, & Co.*

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*Ex parte* SHEEN. *In re* WINSTANLEY.

1876

Jan. 28.

*Act of Bankruptcy—Bill of Sale—Assignment of whole Property to secure Past Debt and further Advances—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, sub-s. 2.*

6 Ch D 337-8  
10 Ch D 323  
17 Ch D 2732-4  
A trader, by deed reciting that the parties of the other part had agreed to give him further time for payment of £287 due for goods supplied to him by them, and to give him further credit for goods to be supplied to him by them, so that the whole debt should not exceed £500, upon condition of having such security given to them as thereafter mentioned, assigned to them substantially his whole property as a security for the sum already

due, and such further moneys (if any) as should become due for goods supplied by them to the debtor. The deed contained no covenant to supply goods, but they were supplied to an amount exceeding the limit in the deed :—

*Held* (affirming the decision of the Chief Judge), that the assignment was not an act of bankruptcy.

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Ex parte  
SHEEN.

In re  
WINSTANLEY.

THIS was an appeal by the trustee from a decision of the Chief Judge (1).

*Little, Q.C.*, and *Finlay Knight*, for the Appellant :—

We contend that by operation of law this deed was an act of bankruptcy independently of the intention of the parties, for it put it in the power of the assignee to break up the trade at once: *In re Wood* (2); *Lindon v. Sharp* (3).

[MELLISH, L.J.:—In that case there was no recital of an intention to make further advances.]

*De Gex, Q.C.*, and *Bagley*, for *Winder* and *Harrop*, were not called upon.

JAMES, L.J.:—

I am of opinion that this appeal is without foundation. Creditors to whom £287 was due agreed to give the debtor further time for payment of that sum, and further credit for goods to be supplied to him by them, so that the whole amount owing should not exceed £500, upon having the moneys so owing or to become owing with interest secured by the assignment in question. Goods accordingly were supplied on credit till the amount due exceeded £500. It is settled that an assignment of the whole of a debtor's property as a security for a sum already due, and substantial further advances, is good. The appeal must be dismissed with costs.

MELLISH, L.J., BAGGALLAY, J.A., and MELLOR, J., concurred.

Solicitors: *Shaw & Tremellen*; *Chester, Urquhart, & Co.*

(1) *Ante*, p. 290, where the facts are fully stated.

(2) Law Rep. 7 Ch. 302.

(3) 6 Man. & G. 895.



C. A.

HASTIE v. HASTIE.

1876

[1875 H. 42.]

Jan. 29.

*Practice—Appeal—New Evidence—Rules of Court, 1875, Order LVIII., r. 5.*

8CD 204  
BFLD 652-34

An Appellant who wishes to produce further evidence on the hearing of an appeal should give to the other side notice of his intention to apply at the hearing of the appeal for leave to produce such evidence.

IN this case there was an appeal from a decree of the Vice-Chancellor *Hall*.

*Everitt*, on behalf of the Appellant, now applied *ex parte* for leave to serve notice of motion for leave to produce further evidence at the hearing of the appeal: Rules of Court, 1875, Order LVIII., rule 5.

JAMES, L.J. :—

You had better give notice to the other side that you will, at the hearing of the appeal, apply for leave to produce further evidence. You need not get from us leave to give that notice.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *W. Tatham & Sons.*

*This decree only affording the  
commentary evidence in Deeds Book  
18CD 652ca*

## FITZGERALD v. CHAPMAN.

[1874 F. 91.]

M. R.

1875

Nov. 9.

*Marriage Settlement—Trust for Wife if she survived her Husband—Dissolution of Marriage—Effect of Decree—Husband's Interest.*

By a marriage settlement property, in which the wife and her father were jointly interested, was settled upon trust for the wife during the joint lives of herself and her husband, and, after her decease, for him for his life, and then upon trusts for the children of the marriage (of whom there were none living), and in default of children, for the wife absolutely if she should survive, but if she should die in the husband's lifetime, then as she should by will appoint, and in default of appointment, for her father. The marriage was dissolved on the petition of the wife. In a suit by the wife claiming to be absolutely entitled to the trust fund:—

*Held*, that the husband's rights were not forfeited by the dissolution of the marriage, and that the bill must be dismissed with costs.

*Jessop v. Blake* (1), *Swift v. Wenman* (2), and *Fussell v. Dowding* (3), not followed.

BY a settlement on the marriage of the Plaintiff with *W. H. D. Fitzgerald*, dated the 9th of November, 1857, and made between *Fitzgerald* of the first part, the Plaintiff of the second part, *W. H. R. Bettesworth*, the father of the Plaintiff, of the third part, and the trustees of the settlement of the fourth part, after reciting that certain sums of stock were held in trust (but subject as to part to the prior life interest of *F. Robien*) for *Bettesworth* for his life, and after his death, as to one moiety for the Plaintiff and as to one other moiety for *Bettesworth*, and also reciting that there were certain other sums of stock in which the Plaintiff and *Bettesworth* respectively had reversionary interests expectant on the death of the Plaintiff's mother, it was witnessed that *Bettesworth* and the Plaintiff thereby respectively assigned unto the trustees their respective interests in the several sums of stock upon trust, during the joint lives of *Fitzgerald* and the Plaintiff (subject to the life interests of *Robien* and *Bettesworth*), for the Plaintiff for her separate use, without power of anticipation, and after her decease

(1) 3 Giff. 639. *84m 25.537*. (2) Law Rep. 10 Eq. 15.

(3) Law Rep. 14 Eq. 421.

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—

for *Fitzgerald* for his life, and, subject to the trusts before declared, in trust as to the first-mentioned sums of stock for the children of the marriage as therein mentioned, and as to the remaining sums of stock, upon such trusts as *Fitzgerald* and the Plaintiff should jointly appoint, and, in default of such appointment, as the Plaintiff, in case she should survive *Fitzgerald*, should by deed or will appoint, and in default of such appointment, upon such trusts as were before contained concerning the first-mentioned sums of stock. And it was declared that if there should be no child of the Plaintiff who should under the trusts thereinbefore declared acquire a vested interest in the trust premises, the same should, from and after the death of *Fitzgerald* and such default or failure of children (which should first happen), be held in trust for the Plaintiff absolutely if she should survive *Fitzgerald*, but if the Plaintiff should die in his lifetime, then in trust for such persons as the Plaintiff should by will appoint, and, in default of such appointment, in trust for *Bettesworth*, his executors, administrators, and assigns.

The settlement contained a power for the trustees to invest the trust premises or any part thereof in the purchase of land which, as to part thereof, was afterwards exercised by the sale of a portion of the stock and the purchase of the *Braydon Hall* estate.

In 1870 the Plaintiff's mother died.

In 1873 the Plaintiff commenced a suit against *Fitzgerald* for a divorce, and a decree *nisi* was made in the Divorce Court on the 13th of November, 1873, for dissolution of the marriage by reason of the husband's adultery, coupled with desertion of the Plaintiff, and on the 24th of February, 1874, the decree was made absolute.

The only child of the marriage who was born alive died in infancy. The general power of appointment vested in the Plaintiff and *Fitzgerald* was not exercised.

In 1874 *Bettesworth* died, having made his will and appointed two of the Defendants executors thereof.

The Plaintiff filed her bill against the trustees of the settlement, *Fitzgerald*, and the executors of her father's will, as Defendants, praying a direction that she was absolutely entitled to the *Braydon Hall* estate, and the sums of stock comprised in the settlement, subject, as to part thereof, to the life estate therein of *F. Robien*, and

that the same might be conveyed and transferred to her absolutely.

*Chitty*, Q.C., and *A. T. Watson*, for the Plaintiff:—

Where, under a marriage settlement, the wife's property is settled upon herself, or is subject to her appointment in case she survives her husband, and the marriage is dissolved by reason of the husband's misconduct, she then becomes absolutely entitled to the property just as if the husband were dead, to the exclusion of the husband's interest and of any contingent interest in default of appointment.

Thus, in *Jessop v. Blake* (1), where a wife's property was settled upon herself for life for her separate use, without power of anticipation, and, if she should survive the husband, upon herself absolutely, but if he should survive, then as she should by will appoint, and, in default of appointment, for her next of kin, the marriage having been dissolved owing to the husband's misconduct, the lady was held entitled to the settled property.

In *Swift v. Wenman* (2), where, under marriage articles, the personal property of the wife, who was then an infant, was agreed to be settled upon the usual trusts, with an ultimate trust for the wife absolutely if she survived, a decree for dissolution of the marriage having been made on the suit of the wife, it was held by Lord Romilly, there being no children of the marriage, that she was entitled to have the trust fund paid to her. In that case the Plaintiff's counsel relied on the cases of *Wells v. Malbon* (3) and *Wilkinson v. Gibson* (4).

In *Fussell v. Dowding* (5), where, by a marriage settlement, the wife's property was vested in trustees upon the usual trusts, and if there should be no issue of the marriage (which was the case), in trust for the wife absolutely in case she survived her husband, the marriage having been dissolved on the wife's petition, Lord Romilly held that she was absolutely entitled to the property.

[The MASTER OF THE ROLLS referred to *Evans v. Carrington* (6).]

(1) 3 Giff. 639. *8 Jm H.S. 537* (4) Law Rep. 4 Eq. 162.

(2) Law Rep. 10 Eq. 15. (5) Ibid. 14 Eq. 421.

(3) 31 Beav. 48. *8 Jm H.S. 250* (6) 1 J. & H. 598; 2 D. F. & J. 481. *6 Jm H.S. 268*



M. R. *Southgate, Q.C., and Kekewich, for the Defendant Fitzgerald,*  
 1875  
 FITZGERALD *Fischer, Q.C., and C. Russell, for the trustees of the settlement,*  
*v.* and  
 CHAPMAN. *Northmore Lawrence, for Bettesworth's executors, were not called*  
 on.

JESSEL, M.R. :—

This is a suit instituted by a divorced lady, claiming property partly coming from herself and partly from her father, and settled on her marriage, as if there had been no settlement, or rather as if the limitations were entirely different from what they are. [His Lordship then stated the effect of the limitations in the settlement.]

There were no children living of the marriage. The husband having been guilty both of adultery and desertion, the lady instituted a suit in the Divorce Court, and obtained a final decree for the dissolution of the marriage.

It is now alleged before me that the effect of that final decree is to destroy, not only the life interest of the husband, who no doubt has been guilty of immoral offences of a very serious description, but also an interest, no doubt very remote and contingent, of the lady's father, who has committed no offence at all.

Now that proposition is a startling one. This is not a Court of criminal jurisdiction. It does not enforce forfeiture upon anybody for any offence whatever. The law did in former days, in certain cases, not being cases of this description, impose forfeiture. That law, as we know, has been altered recently, and forfeiture has ceased to exist as regards property, although there are certain provisions in very peculiar cases of offences of a very deep dye, by which in effect forfeiture is still retained, but there never was any forfeiture, as far as I am aware, for offences of this description.

Forfeiture was confined to the well-known cases of conviction for felony and attainder, but no one suggests there is any forfeiture known to our common law for this offence. If, therefore, the husband has forfeited his life interest, it is not by the common law. Has it been forfeited by statute?

As to that we have the history of legislation, which is not un-instructive. Adultery in the husband has never been treated by

our common law as equivalent to adultery by the wife, nor is it now so treated; but, for what we consider the more serious offence—I am not now speaking of morals, but simply of the law—adultery by the wife, her rights as survivor in her husband's property were not affected by this law. She took her dower notwithstanding that she had committed adultery, until she was deprived of it by statute. The result is, therefore, that unless the husband's interest is forfeited by statute it ought to remain.

But the matter does not stop there. Dissolution of marriage by statute is not unknown to the English law. It was known for very many years before the passing of the *Divorce Act*. No doubt these dissolutions by statute were not under a power delegated to a Judge to dissolve a marriage. They were dissolutions in each case by the Legislature itself. But the effect was the same; it was an absolute dissolution of the marriage. Did any one ever hear, in the case of these dissolutions of marriage, which were granted generally on account of the adultery of the wife, that the wife forfeited her interest under the settlement? No doubt the Legislature might have so enacted it, but it did not, and she kept her interest under the settlement; therefore the notion of forfeiture is wholly out of the question.

Then, when we come to the *Divorce Act* (20 & 21 Vict. c. 85), so far as we can have a clear indication of intention on the part of the Legislature, without express words, we have it there, because in certain cases, under sect. 45, the Court of Divorce then had, and the Division of the High Court which deals with divorce causes now has, the power in certain cases, which, according to the decisions, are confined to cases where there exists some issue of the marriage, to modify the settlement. That very power of modification conferred by the Legislature shews, as clearly as anything can be shewn without expressing it, that in the absence of the exercise of that power the settlement is not affected. The form of this legislation seems, to my mind at least, to shew clearly that that which was not forfeiture before, is not made a forfeiture by reason of the provisions of the *Divorce Act*. That being the state of the law, there is no ground whatever, as far as appears to me, for saying that the husband has forfeited anything.

As regards the father in this case, or the next of kin in some

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of the cases which have been cited, neither he nor they had committed any offence whatever. The benefits given by the marriage contract to third parties, and especially where they proceed, as they do in this case, to a great extent, from the very persons who have conferred benefits, ought not to be affected by the subsequent misconduct of the husband. If the father says, "on the death of my daughter, and failure of issue, my own property shall come back to me," it would be strange indeed to say that, because the husband has committed adultery, the father's property should be taken away. It appears to me entirely impossible to accede to such a suggestion. Then is there any difference where the father has limited the property to the next of kin of his daughter, that is, persons who are blood relations of his own?

The father, in giving a portion to his daughter upon her marriage, may very well say, "If the object of the marriage fail," the object of the marriage being of course the begetting and bringing up of children, "if there are no children, then after my daughter's death the property which I have disposed of for that object of the marriage shall come back either to my next of kin, or to the next of kin of my daughter, who may be but would not necessarily be relations of my own." Why should this disposition of the father be interfered with by reason of the misconduct of the husband? I am at a loss to follow the train of reasoning which has been suggested upon that point.

That being so, if there were no authority on the subject I should have treated this case as hopelessly and utterly unarguable, but I am bound to say there is no blame to be attached to the counsel who drew the bill or the counsel who argued it.

There are to be found in the reports cases which, so far as the decisions go, appear to shew that some of the Judges of the Court of Chancery have adopted a different view. What the precise view was which either of those learned Judges really entertained I do not know, because the three decisions which have been referred to, upon each of which I will say a word or two presently, are remarkable in this respect, that in no case has the learned Judge given any reason whatever for his decision, so that I have nothing to guide me except the facts of the cases and the arguments of counsel.

It is true that in some of the oldest and most important leading cases no reason is to be found in the reports. In such an event the value of an authority depends on one of two things, either that the decision cited was only to be applied to that exact case, or else that subsequent decisions of our Courts, following the original decision, have given reasons for that decision, but in modern authorities we are not generally driven to resort to either expedient.

There was, first, a case of *Jessop v. Blake* (1), very soon after the passing of the Act. There a lady, having a power of appointment over property which came from her father, appointed it by a deed in this way: she settled it upon herself for life for her separate use without power of anticipation, and then in trust for herself if she should survive her husband, and, if she should die in the lifetime of her husband, then as she should by will appoint; and, in default of appointment, in trust for her statutory next of kin. She was divorced on account of her husband's fault, and she made application to Vice-Chancellor *Stuart* to have the fund thus settled transferred to herself. The argument for the Plaintiff was that she was to be treated as if the husband had died on the day of the divorce.

The argument for the Defendant, the trustee, was that it was a post-nuptial settlement, to which the husband was no party. The judgment was: "The right of this lady seems clear. The object of this deed having been to withdraw the whole property from the control of the husband, it has now ceased to have any operation, and she is now absolutely entitled." The judgment, therefore, was that the post-nuptial settlement ceased to have any operation. It was not that the settlement was destroyed, but apparently (for I can only guess) the Vice-Chancellor adopted the argument of the Plaintiff's counsel, that it ceased because the dissolution of the marriage was equivalent to death.

If that were so, it is difficult to see how all the preceding law upon the subject could have been right, and it is impossible to see that there is any change in the declaration of trust or in the position of the parties which authorized it. All I can say is that, considering the vast current of authority which existed previously as regards marriages dissolved, I am quite unable to follow these

(1) 3 Giff. 639.

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cases, which were decided upon the ground that the dissolution of the marriage was equivalent to the death of the husband.

The next case upon the subject is a case which was decided by my predecessor, Lord *Romilly*, of *Swift v. Wenman* (1). There the lady was entitled to personal property upon attaining the age of twenty-one. She married, and marriage articles were entered into by which the property was settled in trust for herself for life, with remainder for her husband for life, then for the children, if any, and if no children in the same way as before—if the husband died in her lifetime then for her absolutely, if he survived, then as she should by will appoint, or in default for her next of kin. There were no children; she was deserted, after she attained twenty-one, by her husband, who also committed bigamy, and she then obtained a decree of dissolution of marriage. She filed a bill asking that the trust funds might be transferred to her.

The counsel for the Plaintiff in that case submitted that she was entitled to a share in the trust fund just as if the husband had died in her life, and for that purpose they cited two authorities, both very good. The first was the case of *Wells v. Malbon* (2), where a married woman was entitled to a share of the residue, and before she received it obtained a dissolution of marriage on account of adultery; she was held entitled to the fund, and, in my opinion, was rightly so held. The husband's right to reduce into possession had ceased by reason of the dissolution, and as he had not reduced the fund into possession it became the wife's, according to well-known law; therefore that case has no application to the present.

The other case cited was that of *Wilkinson v. Gibson* (3). There a decree of dissolution had been made at the suit of the wife, she being at the date of the decree entitled to a reversionary interest, which fell into possession after the date of the divorce. She was held to be entitled, because, as the reversion fell into possession after the dissolution, there was no right in the husband, whose right to reduce into possession only existed during the continuance of the coverture. Her executors (she being dead) were held entitled to the fund. These two authorities, therefore, were no autho-

(1) Law Rep. 10 Eq. 15.

(2) 31 Beav. 48. *8/10/25*

(3) Law Rep. 4 Eq. 162.

rities at all for the purposes for which they were cited, and have no bearing on the question now before me.

[*Chitty*:—In the case of *Swift v. Wenman* (1) the record has been searched, and the fund was reduced into possession.]

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I imagined that it was so. The judgment is thus reported: "Lord *Romilly* considered that the husband had no interest in the trust fund, and made a decree according to the prayer of the bill." I am at a loss to know why, but there it is. It is a decision without a reason, and totally unintelligible to me, and it cannot furnish a guiding principle to me for deciding anything; whether or not it might be binding in the identical case I am not sure, but my present impression is that I should not consider it binding even in the identical case.

The next case is another decision of Lord *Romilly's*, of *Fussell v. Dowding* (2). In that case there was a marriage settlement of the wife's property to be in trust for the wife for life, then for the husband for life, and, if there was no issue, as the wife should appoint by will; and, in default of appointment, for her next of kin in the common form. In that case the contention was, there being no issue, that the trust took effect, and she was in the same position as if the husband had been dead, and the case of *Swift v. Wenman* was cited, and the cases of *Wells v. Malbon* (3) and *Wilkinson v. Gibson* (4) were also cited as being to the same effect. I have already shewn that they were not. Then it was further said in argument that it was clear the right of the husband ceased upon the decree of dissolution, and no claim could be set up on behalf of the Plaintiff's next of kin. Then the husband did not claim, and it fell to the trustees to argue on behalf of the wife's next of kin; and I must say their counsel did their duty in calling the attention of the Court to the very important case of *Evans v. Carrington* (5). The judgment was as follows (6): "I am of opinion that the Plaintiff is entitled to the whole property." Why, I cannot find out at all; but there it is. That is the third decision, and I am unable to follow it.

(1) Law Rep. 10 Eq. 15.

(2) Ibid. 14 Eq. 421.

(3) 31 Beav. 48.

(4) Law Rep. 4 Eq. 162.

(5) 2 D. F. &amp; J. 481.

(6) Law Rep. 14 Eq. 423.

*Am 25. 250* *Am 25. 197*

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On the other hand, there is the case of *Evans v. Carrington* (1), which is a decision of the Court of Appeal in Chancery, and is therefore more binding upon me than the three decisions I have mentioned, although I should consider three decisions of a Court of co-ordinate jurisdiction binding upon me in ordinary cases. In that case Lord *Campbell* observed (2): "The simple dissolution of marriage for adultery makes no difference. Until very recently this could only be effected by a *privilegium*, an act of the Legislature in the form of a divorce bill. Such bills sometimes contained clauses which had full effect, from the omnipotence of parliament, to vary the provisions of marriage settlements . . . . But in as far as the marriage settlement was not expressly varied by the Divorce Bill, the marriage settlement stood firm, and might be enforced for the benefit of the divorced wife,"—that is, divorced by reason of adultery,—and it is added, "Can it be said that there is a difference as to the effect of dissolution of the marriage whether this be brought about legislatively by a *privilegium*, or judicially under a general law? All the arguments for setting aside the marriage settlement after the divorce *a vinculo* apply with equal force to both modes of dissolution."

I should prefer putting it in this way: can it be said that there is a difference between a dissolution of the marriage by statute made with reference to the particular marriage, or under a statute giving the Court power to dissolve it, but passed with reference to all marriages? that is really the only difference, and I should say it amounts to nothing, even if Lord *Campbell* had not so stated.

Then he goes on to consider that there is no new power given to the Court of Chancery at all, and he decides that the settlement is not affected so far as the wife's interest is concerned. How, with that authority before him, my predecessor could come to the conclusion which he did arrive at in *Fussell v. Dowding* (3) I have no means of ascertaining. I must assume that there was some distinction present to his mind, but as I have not got the benefit of the reasons which induced him to arrive at the conclusion that

(1) 2 D. F. & J. 481.

(2) 2 D. F. & J. 490.

(3) Law Rep. 14 Eq. 421.

he did, of course I am quite unable to say how he distinguished the case before him from the case of *Evans v. Carrington* (1).

So far as I can understand the judgment of Lord Campbell in *Evans v. Carrington*, it is precisely in accordance with that which I myself have delivered. If, therefore, there were a competition of authority, I should be compelled, even unwillingly, to follow the decision of the Court of Appeal in preference to those of the Master of the Rolls and the Vice-Chancellor; but, as I have said before, and I am bound to say now, these decisions appear to me to be so contrary to the current of previous authorities, that even in the absence of *Evans v. Carrington* I should have arrived at the same conclusion.

The bill must be dismissed with costs.

Solicitors for Plaintiff: *Humphreys & Morgan*.

Solicitors for Defendants: *Kinsey & Ade*; *Freshfields & Williams*; *Barlow, Bowling, & Williams*.

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### *In re* ATTORNEYS AND SOLICITORS ACT, 1870.

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Nov. 9.

*Solicitor and Client—Agreement for Remuneration in the event of Success—  
—Champerty—Taxing Master—Attorneys and Solicitors Act, 1870 (33 &  
34 Vict. c. 28), ss. 4, 11.*

By an agreement between clients and solicitors, it was agreed that in the event of the solicitors succeeding in recovering certain property for the clients, they should receive 10 per cent. on the value of the property. The agreement was submitted to the Taxing Master before the solicitors had taken any steps in the matter, and the Taxing Master required the opinion of the Court to be taken thereon under sect. 4 of the *Attorneys and Solicitors Act, 1870* :—

*Held*, that the opinion of the Court on the validity or fairness of the agreement could not be required under sect. 4 of the Act, before any money was payable under the agreement.

*Semble*, the agreement in question was champerty, and invalid under sect. 11 of the Act.

THIS was a motion upon the certificate of one of the Taxing Masters that the Court being of opinion that, according to the true

(1) 2 D. F. & J. 481.

*7 Jan 25. 1877*



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construction of sects. 4 and 11 of the *Attorneys and Solicitors Act*, 1870, a certain agreement was a valid agreement if the Taxing Master was of opinion that the terms thereof as to remuneration were fair and reasonable, he might be at liberty to issue his certificate approving of the same.

By the agreement in question, made between the clients therein named of the one part, and their solicitors of the other part—after reciting that the parties of the first part had applied to the solicitors to assert their rights and to recover certain property to which they considered they were entitled; and that the solicitors had represented to them that if they, in addition to the costs ordinarily allowed as between solicitor and client, would pay a sum equal to 10 per cent. on the net value of any of the property therein mentioned, recovered, or preserved for them, they, the said solicitors, would investigate and assert the rights of the parties of the first part, so far as counsel should advise, and the parties of the second part considered proper, and take all necessary proceedings for maintaining such rights—it was witnessed that, in consideration of the premises, the parties of the first part covenanted with the said solicitors that they should, within six months from the recovery of or obtaining a decision declaring their rights to any real or personal estate by the said solicitors, pay to them 10 per cent. upon the net value of the property to be recovered, after deducting all costs, charges, and expenses, such percentage to be calculated as to land, at twenty-five years' purchase; as to personality, at the full value thereof; and further, that the solicitors should have a charge or lien on all such property for such 10 per cent. in addition to their ordinary costs, and that, on demand, a mortgage of the same should be executed. And it was thereby provided that, in the event of no property being recovered beyond a certain legacy mentioned in the agreement, no commission or percentage should be paid on the amount of such legacy, but that the solicitors should only receive costs out of pocket, with interest at 5 per cent.

Before any proceedings were taken by the solicitors the agreement was submitted to the Taxing Master.

The Taxing Master had certified that, in his opinion, the agree-

ment was in contravention of sect. 11 of the Act, but required the opinion of a Court of Equity to be taken thereon.

*C. H. Turner*, for the motion.

JESSEL, M.R. :—

The meaning of sect. 4 of the *Attorneys and Solicitors Act*, 1870, is that a solicitor may make what agreement he likes with his clients, but that he is not to receive any payment under it unless the Taxing Master considers it fair and reasonable; and if he does not consider it so, he may require the opinion of the Court or Judge to be taken on it.

To provide against champerty, it is provided in sect. 11 that “nothing in this Act contained shall be construed to give validity to any purchase by a solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which a solicitor, retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action, or proceeding,” in other words, any agreement which amounts to champerty.

In this case I need not give any opinion as to what is fair and reasonable, for nothing is yet payable under it, and I am of opinion that the solicitor cannot require my opinion to be taken on it until something is payable.

I may, however, say, for the guidance of the parties, that the agreement is, in my opinion, pure champerty, as it gives to the solicitor, in the event of success, what is equivalent to a tenth part of the property to be recovered.

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Nov. 20.

*In re* HUMBER IRONWORKS AND SHIP-BUILDING  
COMPANY.

## WILLIAMS' CASE.

*Company—Winding-up—Contributory—Transfer of Shares—Purchase in Name of Trustee—Intention to escape Liability—Misdescription—Description as “Gentleman.”*

1864 D 583.  
587.

*W.* purchased on the *Stock Exchange* shares in a joint stock company. On discovering that the vendor was a director of the company, *W.* gave as the name of the transferee that of a foreman in his employment at weekly wages of two guineas; and in the transfer the foreman was described as a gentleman, and his address was given at the works where *W.* carried on business. According to the articles of association a transfer could not be made without the approval of the board; and the transfer to the foreman was laid before the board and approved. Within two months of the approval being given, the company was ordered to be wound up. The foreman was at first placed upon the list of contributories, but the official liquidator, on discovering the facts, applied to have his name removed and *W.* settled as a contributory:—  
*Held*, that *W.* could not be placed on the list of contributories.

THE *Humber Ironworks and Ship-Building Company, Limited*, was registered in May, 1864, with a capital of £1,000,000, divided into 20,000 shares of £50 each.

The articles of association of the company provided as follows:—

“156. A transfer of a share shall not be made by any person until after he has given to the secretary or left at the office at least seven days’ notice in writing of his desire to make the transfer, and of the number of every share desired to be transferred, and of the name, residence, and description of the proposed transferee.

“157. A transfer of a share not fully paid up shall not be made without the approval by the board of the proposed transfer.

“158. If the board do not, within ten days after delivery of the notice of the desire to transfer a share, give to the shareholder desiring to make the transfer notice in writing that they do not approve the proposed transfer, then it shall be deemed that the board approve it.

“159. If the board within the ten days give the notice of their

disapproval, then they shall, if the shareholder desiring to make the transfer, by notice in writing delivered to the secretary or left at the office, so require, either purchase for the company or find a person to purchase the share at the market price thereof, or if the board fail to do so within seven days after being so required by the shareholder, and after the market-price of the share is ascertained, then it shall be deemed that the board approve the proposed transfer.

“160. The market-price of the share shall, in case of difference, be ascertained by the certificate of the chairman of the *Stock Exchange, London*; or that failing, then by arbitration.

“161. An entry shall be made in the minutes of the proceedings of the board of the approval or disapproval of the proposed transfer.”

In January, 1866, Mr. *William Watson Williams* (who was the original allottee and holder of fifty shares in the company) purchased on the *Stock Exchange* 100 additional shares in the company, at the price of £500. At this time £20 had been paid up on each share. When the transfer came in, *Williams* discovered that the transferor was one of the directors of the company, and he thereupon caused the transfer to be filled up with the name of *Thomas Hull*, described as of 28, *Compton Street, Clerkenwell*, gentleman, as transferee. *Hull* executed the transfer, which was laid before the board of directors, and approved on the 20th of January, 1866.

On the 13th of March, 1866, the company was ordered to be wound up, and in the winding up *Hull's* name was placed on the list of contributories. Until a recent period *Hull* could not be found, but it was now discovered that he was a person of no means; that in 1866 he was a foreman in the employment of *Williams* (who carried on business at 28, *Compton Street*), and received weekly wages of two guineas; that he signed the transfer at the request of *Williams* without receiving any consideration; and that when the company was ordered to be wound up he went into *Yorkshire* by *Williams's* desire, and that *Williams* continued to pay him his wages of two guineas a week until June, 1871, when he obtained another situation.

The official liquidator now applied that *Williams* might be

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settled on the list of contributories in the place of *Hull*, and the application was adjourned into Court.

*Southgate*, Q.C., and *Northmore Lawrence*, for the official liquidator:—

A purchaser of shares may, no doubt, have the shares transferred to a trustee for himself, provided it is done for an honest purpose: *Ex parte Bugg* (1); but here the sole object was to avoid liability. Moreover, the purchaser held out the trustee as a solvent person, which he was not. The whole transaction is vitiated by fraud; and the real owner of the shares ought to be put on the register.

[They referred to *Bunn's Case* (2); *King's Case* (3).]

*Marten*, Q.C., and *Millar*, for *Williams*, were not called on.

JESSEL, M.R.:—

This is an application by the official liquidator of the *Humber Ironworks Company* to put a gentleman of the name of *Williams* upon the list of contributories under these circumstances:—

A Mr. *Graham*, a director of the company, was the owner of some shares. He contracted to sell them in the market, I suppose through a broker, in the usual way, to Mr. *Williams*. Mr. *Williams*, having heard that the vendor was a director, preferred to give the name of *Hull*, his foreman, as a trustee for himself, and he sent in that name to the board of directors. *Hull* was properly described in every respect except one, and perhaps not wrongly in that respect. He was described as “a gentleman,” which he may possibly have been. His address was given as that of his master's works, and that was not a wrong address. The board of directors had power to disapprove of the transferee, and if they had performed their duty they should have inquired at the works, at the address given, who Mr. *Hull* was. Whether they did or did not is not now material; they approved of Mr. *Hull*, and the shares were duly transferred and registered in his name. Years elapsed; the company is wound up and Mr. *Hull's* name is upon the list of

(1) 2 Dr. & Sm. 452.

(2) 2 D. F. & J. 275.

(3) Law Rep. 6 Ch. 196.

contributories. Then the official liquidator is informed of these facts, and he seeks to take Mr. *Hull's* name off and put Mr. *Williams'* name on. Why, I am utterly unable to discover. Mr. *Williams* was never a shareholder. He had entered into no contract with the company. He made no bargain with the company to undertake any of their liabilities. A trustee for him had, and that trustee is the shareholder. There may be some rights as between *Hull* and *Williams*, but I have nothing to do with that. Neither directly nor indirectly had Mr. *Williams* anything whatever to do with the company.

Then it is said that the directors, if they had known the truth (and there was nothing to prevent their knowing the truth, because they had got the right address and could have ascertained who *Hull* was), would have known that he was not the "gentleman" he was described to be. Whether he had any means or was without means is not material, but a person who is described as "a gentleman" may be a man without occupation, and he is certainly less likely to pay than anybody else. It is a description, of all others, to call for an inquiry, because it is so indefinite and elastic. However, that being the only point alleged of misdescription, if misdescription it were, it is contended that it, the transaction, is a gross fraud of Mr. *Williams'*; and that the consequence of that is, that a man who never contracted with the company, whom the company never heard of, and with whom the company had nothing whatever to do, is to be transformed into their shareholder by way of punishment for committing this gross fraud. I am quite unable to appreciate this argument. It appears to me that there is no pretence for the application, and I refuse it with costs.

Solicitors: *Carr, Bannister, Davidson, & Morriss; Wright, Bonner, & Wright.*

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## ALBION STEEL AND WIRE COMPANY v. MARTIN.

1875

[1875 A. 19.]

Dec. 1, 2.

*Company—Purchase of Business.—Provisional Director—Contract with Vendors to Company pending Incorporation—Liability to account.*

662 D396

In August, September, and October, 1872, negotiations were carried on for the purchase of the business of *F. & B.* by a limited company. *M.*, who often had large contracts with *F. & B.* for the delivery of goods, on the 7th of September agreed to become a director of the proposed company, and on the 24th of September an agreement was entered into between *F. & B.* and a trustee for the company for the purchase and taking over by the company as from the 1st of September the business of *F. & B.*, and for carrying on all contracts entered into by them as buyers or sellers. On the 7th of October *M.* attended a meeting of the directors. On the 24th of October the memorandum and articles of association were signed by *M.* The articles ratified the agreement of the 24th of September. On the 31st of October the company was incorporated. On the 15th and 25th of October, and on subsequent dates, *M.* entered into contracts with *F. & B.*, and afterwards with the company, for the delivery of goods; some of the goods under the earlier contracts were not delivered by the 31st of October.

In a suit by the company to make *M.* liable to account for profits made on all these contracts :—

*Held*, that he was not, under the circumstances, liable to account for profits in respect of contracts prior to the incorporation of the company, but only for those after that date.

THIS was a suit by the Plaintiff company for the purpose of making the Defendant, *Stephen Martin*, liable for the profits of certain contracts entered into by him under the following circumstances :—

In August, 1872, Messrs. *Fox & Bear* were carrying on business at *Sheffield* under the style of *Gray & Co.* During the months of August and September, 1872, negotiations were pending between *Fox & Bear* and *Alfred Allott*, of *Sheffield*, for the formation of a joint stock company to purchase the property and carry on the business of *Fox & Bear*. The Defendant, who was at that time carrying on the business of steel converter and iron merchant at *Sheffield*, and was doing a large business with *Fox & Bear*, was requested to become a director of the new company, and was told that if he should become a director a clause would be inserted in

the articles of association enabling him to continue to do business with the company on fair terms, though a director thereof. The Defendant, on the 11th of September, 1872, consented to be a director on that understanding.

On the 23rd of September, 1872, the Defendant was summoned to attend a meeting of the proposed directors of the new company, but was unable to be present.

On the 24th of September, 1872, the prospectus of the proposed company, called the *Albion Steel and Wire Company, Limited*, was issued, in which the Defendant was described as one of the directors, and which contained the following statement:—"This company is formed for the purchase and continuance of the property and business carried on by Messrs. *Gray & Co.* at the *Albion Steel and Iron Works* and the *Pendhill and River Steel Works* at *Sheffield*. The only agreement which has been entered into is one dated the 24th of September, 1872, and made between *John Fox*, and *John Bear* of the one part, and *Alfred Allott*, on behalf of the company, of the other part. Applications for shares must be made on the annexed form, and must be sent to Messrs. *Allott & Co.* on or before 5th of October, 1872."

By the agreement referred to in the said prospectus, *Allott*, who was called the promoter, agreed with *Fox & Bear* that he would take steps for forming the company, having for one of its objects the purchase of the business of *Fox & Bear*, and that the memorandum and articles of association should give effect to the provisions of the agreement, and the vendors (*Fox & Bear*) agreed to sell, convey, assign, and assure to the company when incorporated, and the promoter, on behalf of the company, agreed with the vendors that they should purchase the business of *Fox & Bear*; and it was agreed that the vendors should forthwith make all necessary arrangements for delivery up to the company after its incorporation, and the company should be deemed to have taken possession as on the 1st of September, 1872, of the property therein described, and that the company should as from the same day carry out, or cause to be carried out, all contracts and agreements then in course of completion, or in course of being executed, or which might have been either before or after the same day entered into by the vendors either as buyers or sellers or otherwise in

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respect of the said business; and that all acts done between the said 1st day of September, inclusive, and such delivery should be regarded as the acts of the company, and all things should be done and all events should be brought about to make the taking of possession date back to the 1st day of September instant, as far as was reasonable and practicable, with a view of giving effect to the true intent and meaning of the agreement.

On the 7th of October, 1872, the Defendant and the other persons named in the prospectus as directors of the proposed company met for the purpose of considering the applications which had been made for the shares and of allotting the shares, and the allotment of shares was then made.

On the 15th of October, 1872, *Martin* entered into a contract with *Fox & Bear* for a delivery of iron; and on the 25th of October he entered into a similar contract. He also entered into other contracts, some of which were prior, and others subsequent, to the incorporation of the company. The delivery of the iron under these contracts was not completed when the company was incorporated.

On the 24th of October, 1872, the memorandum of association was signed by the Defendant for 400 shares, and the articles of association were issued, but they were not registered till the 31st of October, 1872, when the company was duly incorporated under the *Companies Acts*, 1862 and 1867.

The articles of association, after stating the agreement of the 24th of September, 1872, adopted it in these terms:—

“The company hereby ratify, confirm, and adopt the hereinbefore stated agreement, and declare the same to be binding upon the company, and authorize the directors to carry the same into effect, with full power, nevertheless, to agree to any modifications thereof as they may deem advisable in the interests of the company.”

The articles did not contain any clause enabling the Defendant to enter into contracts or carry on his business with *Fox & Bear*, notwithstanding his position as director.

The bill was filed by the Plaintiff company against the Defendant, and prayed for an account of the gains and profits derived

by the Defendant from each contract entered into after the 31st of August, 1872, and previously to the incorporation of the company by the Defendant with *Fox & Bear*, and also from each contract entered into with the company while the Defendant was a director of the company.

The Defendant admitted his liability to account for the profits made by him in respect of contracts after the company was incorporated, and paid into Court the sum of £350. The only question was as to his liability in respect of previous contracts.

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*Robinson, Q.C., and Bush*, for the Plaintiff company :—

The bill in this case prays for an account against the Defendant in respect of all contracts entered into with *Fox & Bear* from the time when he agreed to become a director of the proposed company to the date of its incorporation, and also in respect of certain subsequent contracts. As to the latter, the Defendant has admitted his liability and submitted to account. As to the former, he disputes his liability. Our contention is, that from the time when he first agreed to become a director, he at once entered into a fiduciary relation with the intended company, more especially after the 7th of October, 1872, when he attended a meeting of the provisional directors for the purpose of settling the allotment of shares. Some of the contracts were entered into before, and some after, he had actually signed the memorandum of association ; but that is immaterial, as in either case he was disabled from contracting. The articles of association, which adopted the agreement with *Fox & Bear*, contained no provision enabling the Defendant to contract. It is true that the company was not actually incorporated till the 31st of October ; but the mere fact of incorporation or non-incorporation of a company does not affect the position of a person who has agreed to become a director, and has acted in that character. Whether, therefore, the Defendant is to be looked upon in the light of a director, or a trustee, or an agent, he is liable to account. He cannot be both a buyer and seller. Besides, the contracts were for the delivery of iron, which in some cases was not completed till after the date of incorporation ; he must, therefore, be made liable to account for all the profits made in respect of the contracts in question : *Aberdeen*

M. R. *Railway Company v. Blaikie* (1); *Hichens v. Congreve* (2); *Tyrrell v. Bank of London* (3); *Benson v. Heathorn* (4).

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*Chitty, Q.C., and North, for the Defendant:—*

The case of *Tyrrell v. Bank of London* is distinguishable, as there *Tyrrell* had an interest in the contract which was not disclosed.

The contracts in this case were all contracts with *Fox & Bear*, whose business was taken over by the company, who must be taken to have known of and acquiesced in all the contracts subsisting at the time of the incorporation. The Defendant could not, when the company was not formed, be treated as in a fiduciary position and liable to account. He could not be an agent when there was no existing principal: *Kelner v. Baxter* (5). It is true that the Defendant signed the memorandum of association, but that did not make him a party to the agreement between *Fox & Bear* and the company. The Defendant has already submitted to account for all profits made by him in respect of contracts entered into after the incorporation, but he cannot, in the absence of fraud, which is not alleged, be made liable for any of the previous contracts.

[They also referred to *Pritchard's Case* (6) and *Firmstone's Case* (7).]

*Robinson, in reply.*

JESSEL, M.R.:—

This is, in my opinion, one of those cases, by no means unfrequent, in which a well-known principle of law is difficult of application by reason of the facts of the case bringing it, so to say, on the disputed border land. I have always thought, in those cases where the Court is satisfied of the *bona fides* of a transaction, and its entire freedom from the mischief which the established principle of law was intended to prevent, that the Court should lean on the side of fair dealing, and should not so apply the prin-

(1) 1 Macq. 461.

(4) 1 Y. & C. Ch. 326.

(2) 4 Russ. 562.

(5) Law Rep. 2 C. P. 174.

(3) 10 H. L. C. 26.

(6) Ibid. 8 Ch. 956.

(7) Law Rep. 20 Eq. 524.

ciple of law so as to make it comprise a case not within the mischief which it was intended to prevent without absolute necessity, the necessity being that of preserving the principle untouched for the guidance of mankind in their ordinary transactions.

The case is, no doubt, one of very great singularity. The facts are undisputed, and are probably such as have not occurred before, and are not likely to occur again. [His Lordship then stated the facts of the case.]

The first object of the bill is to obtain from *Martin* the profits on those contracts entered into before incorporation of the company on which he made a profit, not allowing him anything for the loss as regards those contracts on which he made a loss, if there were any. The second object of the bill is to make him account in respect of other contracts which he entered into with the company after incorporation, as to which it is not denied that he is liable to account, although the offer made before the bill was filed to pay a sum of £350 was not an offer to pay the amount of profit which he was liable to pay, but the difference between that amount and the loss that the Defendant sustained.

As regards the first part of the case, the Plaintiffs say, and say truly, that whether you look upon a director as a trustee or as an agent he cannot take the benefit of a contract entered into between himself and the company, because he is not to make a profit in the case where he is both buyer and seller. That is the simplest principle. He cannot act in both capacities, and do justice to the purchaser if he is the seller, or do justice to the seller if he is the purchaser. Being in a fiduciary position, and having, therefore, a duty to perform to what are commonly called his constituents, that is, the company and the shareholders, he is not entitled to say that he will perform that duty properly in a case where his self-interest would be opposed to the proper performance of the duty. That is an intelligible principle, and one well understood.

How does that apply to this case? It is quite true that at the moment these contracts were entered into *Martin* knew that it was proposed to incorporate a company to take them over. It is quite true that in substance he dealt in exactly the same way as if a company had been formed, though in fact it was not formed. In fact, at the moment when he entered into these contracts he was

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not a trustee or agent for anybody. He was absolute owner of the goods, and he was selling to *Fox & Bear*, who were also the absolute owners of the trade. I cannot find anything in law to say that between the dates when these contracts were entered into, that is, the 15th and the 25th of October on the one side, and the 31st of October on the other, there was anything to prevent *Martin* from insisting that *Fox & Bear* were personally liable in damages to him for a breach of these contracts, and of course the amount of damages could have been ascertained by reference to the amount of loss which he would have sustained by reason of their not accepting the iron at the price at which it was sold. If, therefore, he became liable to the company at all, he must have become liable by reason of something done after these dates. When the incorporation of the company took place, the company must be taken to have adopted the contracts by the articles of association, to which in a sense *Martin* was a party, and in a sense *Fox & Bear* were parties, because the Act of Parliament says that every shareholder is to be in the same position as if he had signed the articles.

But what was the adoption? The adoption was simply this, that the agreement was to be binding on the company, and the directors were authorized to carry the same into effect. What agreement? An agreement between *Fox & Bear* of the one part, and the promoter, on behalf of the company, of the other part, that the company shall carry out *Fox & Bear's* contracts, and nothing more. I do not find any agreement that *Fox & Bear* shall be released as between themselves and the persons with whom they contracted. There is an agreement that they shall be indemnified as between themselves and the newly established company. But all persons who had a right to sue *Fox & Bear* retained that right, and it does not appear that they are deprived of it, or are intended to be deprived of it, by the form or by the adoption of the agreement. It seems to me, therefore, that in form, as in substance, these are contracts by *Fox & Bear* as is admitted. I lay out of consideration any question of fraud. This Court is quite strong enough to deal with any question of fraud where such a question arises. I am dealing now with an ordinary *bonâ fide* mercantile contract. The company

had all the protection they were entitled to. They had the judgment of *Fox & Bear*, who were the delegates or agents in a sense to carry on the business during the interval. They fairly exercised that judgment, and carried on the business to the best of their ability, and bought iron at what they thought a fair and advantageous price to the company. Therefore the company really had on their part a purchaser acquainted with all the facts, and good agents, who made the bargain on their behalf. It was not, in fact, made on their behalf by *Martin*; it was really made by persons wholly independent of him, namely, *Fox & Bear*, who were carrying on the business really, as regards the law, on their own account, but by reason of a retro-active clause in the agreement on the part of the company.

It appears to me, therefore, that this case is not within the mischief to which the principle of law was intended to be applied. If the facts are looked into, they were not really contracts between *Martin* and the company, but contracts between *Martin* and *Fox & Bear*; and as between *Fox & Bear* on the one side, and the company on the other side, they have been adopted by the company. I am, therefore, of opinion that this part of the case fails.

I now come to the very important question of costs. My rule as regards costs has always been, and I trust it will always remain unless a higher Court should decide that the principle is erroneous, that in a case of legal demand the costs are paid to the successful party in litigation. There may be cases of exception, but those cases must be founded on something in the shape either of want of good faith or other misconduct. In the case before me I cannot help seeing that the substance of the litigation is the first claim. Thinking the Defendant is right as to the first, if he had tendered all that he was liable to pay as to the second I should have given him his costs up to the hearing. I cannot do that now. I think the right order to make, seeing the litigation has in fact been caused by both parties, will be to say that there shall be no costs on either side up to and including the hearing. I will direct an account as regards the second set of contracts, and refer it to the Registrar at *Sheffield*.

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## FOSTER v. FOSTER.

[1875 F. 33.]

*Real Estate of Infant—Conversion—Partition Suit—Sale under Decree—Partition Act, 1868 (31 & 32 Vict. c. 40), s. 8—Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), ss. 23–25).*

Where real estate to a share of which infants were entitled was sold under the decree in a partition suit:—

*Held*, that the proceeds of sale must be treated as realty, by force of the 8th section of the *Partition Act, 1868*, incorporating the provisions of sects. 23 to 25 of the *Leases and Sales of Settled Estates Act*.

*Steed v. Preece* (1) distinguished.

## FURTHER CONSIDERATION.

*David Mitchell*, by his will, dated the 21st of February, 1850, devised amongst other property his real and leasehold estate to *Isaac Mitchell, John Foster, and William Ackroyd*, their heirs, executors, administrators, and assigns, upon trust to pay the annual proceeds to *Isaac Mitchell* during his life, and after his decease to pay, assign, and transfer the whole of the trust estates and premises unto his nephews and nieces, *John Foster, William Foster, James Foster, Clara Mary Eadon*, the wife of *William Henry Eadon*, and *Eleanor Jarvis* (who afterwards married *Benjamin Cartledge*), in equal shares. And the testator directed that if any of his said nephews and nieces should die before the trust estates and premises should be paid, assigned, and transferred as aforesaid, leaving children, then the children of such of them so dying should take their parent's share; but if any of his said nephews and nieces should die before the said trust estates and premises should be paid, assigned, and transferred as aforesaid, without leaving children, then the same trust estates and premises should go to the survivors of his said nephews and nieces in equal shares.

The testator died on the 23rd of May, 1854.

*William Foster* died on the 13th of October, 1865, leaving four infant children. *James Foster* died on the 19th of May, 1872, without issue.

(1) Law Rep. 18 Eq. 192.

60CLD.492.  
— 553-4  
17CLD.242  
19CLD.302  
22CLD.624

*Isaac Mitchell*, the tenant for life, died on the 21st of December, 1874.

The bill was filed by *John Foster*, *William Henry Eadon* and *Clara Mary* his wife, and *Benjamin Cartledge* and *Eleanor* his wife, the persons absolutely entitled to two-thirds of the freehold and leasehold estates, as Plaintiffs, against the infant children of *William Foster*, for sale or partition.

The cause came on to be heard on the 23rd of April, 1875, when the usual inquiries were directed as to the real and leasehold estates of the testator and the parties entitled thereto, and a further inquiry was directed whether a sale or partition would be most beneficial to the parties interested, and it was ordered that the freehold and leasehold estates should be sold, if parties entitled to a moiety or upwards should request a sale, or if such sale should be found more beneficial for the parties interested, and any of them should request a sale. In the result, on the 23rd of September, 1875, the freehold and leasehold estates were sold at the request of the Plaintiffs for £2310 and £1205 respectively, and these sums were paid into Court to accounts entitled "Proceeds of sale of testator's freehold estates," and "Proceeds of sale of testator's leasehold estates."

It was now proposed to pay out to the Plaintiffs their shares of the two funds, and to carry over to the separate account of the infant Defendants their share of the two funds; and the question was raised whether, in the case of the infant Defendants, their share of the fund representing the freehold estate was to be treated as realty, in which event it would become necessary to apportion the costs of suit between the two funds, and to carry their share of each fund to a distinct account.

*Warmington*, for the Plaintiffs.

*Rendall*, for the Defendants:—

In *Steed v. Preece* (1), where real estate of which an infant was tenant in common in tail had been sold under an order of the Court, and the infant died without having attained twenty-

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one, your Lordship held that, as the conversion had been rightfully made, the infant's legal personal representative was entitled to the produce, and not his heir-at-law. And that decision was followed in *Arnold v. Dixon* (1) with respect to the share in real estate of a tenant in common who died after a sale had been ordered in a suit for partition, but before the sale was effected. But these cases do not apply to the present case, for by sect. 8 of the *Partition Act*, 1868 (31 & 32 Vict. c. 40), it is enacted that sects. 23 to 25 inclusive of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120) shall extend and apply to money to be received on any sale effected under the authority of the *Partition Act*. I submit, therefore, that the Defendants' share of the proceeds of sale of the freehold estate must be treated as real estate.

JESSEL, M.R. :—

All that I decided in *Steed v. Preece* (2) was, that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of conversion must follow, if there be no equity in favour of the heir or any one else for re-conversion. In the present case I think there is such an equity in the provisions of sects. 23 to 25 inclusive of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), which must be read as part of the *Partition Act*, 1868. There must, therefore, be an apportionment of the costs, and the infant Defendants' share of each fund must be carried to a distinct account.

Solicitor: *H. A. Maude*, agent for *J. & G. E. Webster, Sheffield*.

(1) Law Rep. 19 Eq. 113.

(2) Law Rep. 18 Eq. 192.

## METCALFE v. HUTCHINSON.

[1872 M. 16.]

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*Will—Construction—Direction to pay Debts out of Rents and Profits of Real Estate—Charge on Corpus—Sale or Mortgage.*

A direction in a will to pay debts out of rents and profits of real estate *primâ facie* charges the debts on the corpus, unless the will contains a context shewing that annual rents and profits only are meant.

Where debts are charged on settled real estate the Court, in determining whether the debts are to be raised by sale or mortgage, will give greater weight to the wishes of the persons whose interests in the estate are immediate, than to those whose interests are more remote.

**THOMAS CLEASBY**, by his will, dated the 26th of February, 1865, devised and bequeathed as follows: "I give, devise, and bequeath unto *Anthony Metcalfe*, of *Park House, Ravenstonedale*, yeoman, whom I appoint trustee of this my will, all my real and personal estate whatsoever and wheresoever, of what nature and tenure soever, whereof I have any power to dispose; that is to say, upon trust that he, the said *Anthony Metcalfe*, shall receive the rents and profits of all my real and personal estate; and from the said rents and profits I direct that my aforesaid trustee, or trustees for the time being, shall receive the sum of £10 every year, so long as they or their heirs shall have to act over my aforesaid real and personal estate; I also direct that my debts be paid out of my rents and profits, and after my debts have been paid, I direct that my said trustees shall pay out my rents and profits to my man servant, *Robert Hutchinson*, the sum of £500, the same to be paid by five yearly payments; and I further direct that, after paying the above sums, that the remainder of the rents and profits be divided equally between my uncles, *Adam Hutchinson*, *John Hutchinson*, and *Robert Hutchinson*, and my aunt *Ann Hutchinson*, for the term of their natural lives, and after their decease then upon trust for all and every the said (*sic*) children of the above-named uncles *Adam*, *John*, and *Robert Hutchinson*, their heirs and assigns, in equal shares as tenants in common, and if only one such child, then for one such child, his or her heirs and assigns. But if my said uncles should happen to die without

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leaving child or child (*sic*) or children, or such child or children should happen to die before attaining the age of twenty-one years, then upon trust I direct that my trustee or trustees shall pay to my cousin, *William Cleasby*, of *Wharton Hall*, the yearly income of my aforesaid real and personal estates during the term of his natural life, and after his decease upon trust for all and every or any of the child or children of the said *William Cleasby* in such shares, and to be vested in them at such times, as he shall by any deed in writing, or by his last will and testament (*sic*). And I further direct that if my said cousin *William Cleasby* should die leaving no issue, or such issue should die before attaining the age of twenty-one years, then I give, devise, and bequeath the whole of my real and personal estate to *Adam Hudson*, *Delph Hill House*, *Caverly Moor*, near *Bradford*, his heirs and assigns for ever." And the testator appointed *Anthony Metcalfe* his sole executor. The testator died in June, 1871. The suit was instituted for the administration of the trusts of his will, and now came on to be heard on further consideration. The question was whether, as between the tenants for life and the remainderman, the testator's debts (which considerably exceeded the amount of his personal estate) were charged on the corpus of his real estate or ought to be paid out of the rents and profits as they accrued.

*Marten*, Q.C., and *Kekewich*, for the Plaintiff, the trustee and executor of the will.

*Chitty*, Q.C., and *Badcock*, for *William Cleasby*, contended that the debts ought, as between tenant for life and remainderman, to be paid out of the rents as they accrued; and they stated that their client was willing to advance the money necessary for payment of the debts upon the terms of being repaid out of the rents. They cited *Wilson v. Halliley* (1); *Heneage v. Andover* (2); *Tewart v. Lawson* (3); *Fitzherbert v. Wells* (4).

[The MASTER OF THE ROLLS referred to *Lingon v. Foley* (5) *Bootle v. Blundell* (6), and *Backhouse v. Middleton* (7).]

(1) 1 Russ. & My. 590.

(2) 3, Y. & J. 360.

(3) 1 Law Rep. 18 Eq. 490.

(4) 4 W. R. 33.

(5) 2 Cas. C. 205.

(6) 1 Mer. 193.

(7) 1 Cas. C. 173.

They also submitted that in any event the money received for payment of debts ought to be raised by mortgage and not by sale.

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*Nalder*, for *Adam Hudson*, supported the same view, citing *Taylor v. Emerson* (1); *Small v. Wing* (2); *Phillips v. Guteridge* (3); *Lord Londesborough v. Somerville* (4).

*Davey*, Q.C., and *O. A. Saunders*, for the tenants for life, were not called upon.

JESSEL, M.R. :—

In this case I may quote the words of Lord *Eldon*, and say “that, after all the attention I have been able to give to this case, I feel convinced that the charge for payment of debts is to be raised by sale or mortgage of the corpus. In saying this I do not mean it should be inferred that it is, in my opinion, impossible that other Judges, after looking through the cases with the same attention I have done, would come to a conclusion respecting this will the same as that I have come to.” Those words might be quoted not only in this case, but in other cases.

The first question is, whether there is a settled rule of construction in such cases; because when a will is made in modern times after a rule of construction has prevailed for at least a century and a half, one must not suppose that settled rules of construction are altogether disregarded by framers of wills. I think that there is a settled rule of construction applicable to this case more than a century and a half old. It is unnecessary, perhaps, to go so very far back, but there is an important case as long ago as the twenty-second year of King *Charles II.*, which appears to me to decide the point now before me. It is the case of *Backhouse v. Middleton* (5). There Sir *William Middleton* being seised of the king's moiety in the *New River Water* in fee, consisting of thirty-six shares, conveyed the same (it must not be forgotten that under the Act of Parliament the *New River Water* shares were made fee simple of inheritance, to be governed by the same rules as ordi-

(1) 2 Con. &amp; Law. 558.

(2) 5 B. P. C. Toml. 66.

(5) 1 Cas. C. 173.

(3) 3 D. J. &amp; S. 332.

(4) 19 Beav. 295.

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nary freehold land) to *Henry Middleton* upon trust for himself and wife during their respective lives, and after that the trustee, out of the rents and profits of the premises, should pay his debts, and portions for his daughters, at certain days; and after to permit Sir *Hugh Middleton*, heir of Sir *William*, and his heirs, to take and receive the rents and profits of the premises; that is to say, that after payment of the debts and portions Sir *Hugh* was to take and receive the rents and profits of the premises. Nothing could be clearer on the face of that settlement, which was a deed and not a will, than that the rents and profits were to be received after the payment of debts and portions. The terms are far stronger than "residue and remainder." There was a tenancy for life, then the trust, and then the remaindermen were to take and receive the rents. Then by the Plaintiff it was insisted that the trustees had not by the trust power to sell, the trusts being to pay the daughters' portions out of the rents and profits. To that "it was replied by the Court that the trustees were not to pay the portions out of the annual rents and profits, but out of the rents and profits, and those portions were to be paid at prefixed days, which the annual profits would not do; and therefore conceived the trustees might sell for that purpose within the intention of the trust, and so declared he was of opinion to dismiss the bill, but withal said he would think further of it." But it appears he did not change his mind. That rule is intelligible. The rule being that where there is a trust to pay, or to raise and pay, or to raise or pay gross sums out of rents and profits, that means out of the estate; and you may sell it or mortgage it for the purpose of paying the gross sum, the reason being that the sum is to be paid at once, and the rents and profits are not sufficient for that purpose. There are two intents here—the one to pay the gross sum, and the other to raise it out of rents and profits. The gross sum can only be paid in the case of sale or mortgage, and therefore if the testator says out of rents and profits he means out of the estate. That is the rule, and it is a very intelligible one. That applies with greater force where the gross sums to be paid are debts—present debts—because the testator must know that he cannot avoid paying his debts. I am now speaking, of course, of a modern will when the creditor can resort to the real estate as a matter of right for the purpose of obtaining

payment of debts, and it would be a very strange intention to attribute to a testator that he should by his will intend to postpone the creditor, he having no legal right to postpone him. I think that would not be a right mode of construing wills. We must assume that a testator knows his debts must be paid, and soon after his decease. The whole of the argument which applies to paying portions or a gross sum at a fixed day applies with greater force to the payment of debts. I hold it to be an established rule of construction that in a deed or will where you find a trust to pay debts, or to raise and pay debts, or to raise or pay debts out of rents and profits, that, without more, means that you may raise them by sale or mortgage. I say "without more," because you may find in the instrument a context which will overrule that construction, but the great point to bear in mind is that you must find a context to get rid of that construction. It is not that there is a *primâ facie* construction that rents and profits mean annual rents and profits, but in the case I have put the *primâ facie* construction is that it means to pay out of corpus. Whether that is or is not the natural meaning of the words to any person not a lawyer is not the point I have to consider. That had come before the Court many times before; and in *Bootle v. Blundell* (1), decided in 1815, we have this stated by Lord Eldon, "Then it is asked, could it be the meaning of this testator to delay his creditors and legatees so as to make them obtain payment of their debts and legacies only out of the rents and profits as they shall accrue? If I were asked this question anywhere but in *Westminster Hall*, I should answer it in the affirmative, that by profits he probably meant annual profits only; but I have understood it to be a settled rule that where a term is created for the purpose of raising money out of the rents and profits if the trusts of the will require that a gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage." No doubt he speaks of a term being created, but the rule is general. In that case the word was "pay," and he did not intend to limit the rule to a case in which the word "raise" was used instead of "pay." So that as long ago as 1815 the Lord Chancellor held that, whatever the natural or general meaning of the words was to people who were not lawyers,

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(1) 1 Mer. 193, 232.

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to a lawyer rents and profits meant, in a case of that kind, to describe the corpus of the estate for this purpose. That is the general rule, and you must find a context against it.

Now, in all these cases, when you talk of "a context against it," you must consider what that means. It must be something plainly shewing that the testator intended, what must be considered an absurd intention, namely, an intention to delay his creditors, which he had no power of doing, by keeping his estate unsold; in other words, to force his creditors to sell the estate in the most expensive and damaging manner, by the order of the Court of Chancery; that he would not allow the trustees to pay the debts, but put in a clause that the trustees should not pay the debts unless the creditors took proceedings. That is the effect of the contention. Can I find such words here? On that, again, there is a great deal of authority—a great deal too much for me to cite; but it is to be noticed that everything that has been relied upon as shewing this intention in this will has occurred in other cases, and been held not sufficient. In the first place, this will is remarkable in another way. It is a gift, not of real estate only, but of real and personal estate, upon trust that the trustee "shall receive the rents and profits of all my real and personal estate," profits not being an apt word for personal estate. Then the trustees are to have £10 a year so long as they shall act; and then he says: "I also direct that my debts be paid out of my rents and profits; and after my debts have been paid" (the very thing that occurred in *Backhouse v. Middleton*) "I direct my trustee shall pay out of my rents and profits to my man servant *Robert Hutchinson* the sum of £500, the same to be paid by five yearly payments; and I further direct that, after paying the above sums, the remainder of the rents and profits be divided equally between my uncles, *Adam Hutchinson*, *John Hutchinson*, and *Robert Hutchinson*, and my aunt *Ann Hutchinson*, for the term of their natural lives, and after their decease then upon trust for all and every the children" (there is no gift of corpus in any other way than as "remainder of the rents and profits," and it can hardly be argued that the children do not take absolutely for the trust is for) "the children of the above-named uncles *Adam*, *John*, and *Robert Hutchinson*, their heirs and assigns, in equal shares, as tenants in common; and if only one such child, then for



one such child, his or her heirs and assigns." Here we have an undoubted instance, on the face of the will, where rents and profits described capital, or rather where a gift of rents and profits for ever for their heirs and assigns must mean a gift to them of the capital. Not only that, but it is "the remainder of the rents and profits" which describes the capital. Then, if the tenants for life die without children, the trustees are to pay "to my cousin *William Cleasby*, of *Wharton Hall*, the yearly income of my aforesaid real and personal estates during the term of his natural life, and after his decease upon trust for all and every or any of the child or children of the said *William Cleasby*, in such shares, and to be vested in them at such times, as he should by any deed or writing, or by his last will and testament appoint," and then, if he leaves no issue, the testator gives the whole of his "real and personal estate to *Adam Hudson*, *Delph Hill House*, *Caverly Moor*, near *Bradford*, his heirs and assigns, for ever."

Now it has been argued that the words "the whole of my real and personal estate" were inconsistent with the notion of any part being sold. The obvious reply to that is, that the gift of "the whole of my real and personal estate" is merely the residue after payment of debts. The testator knows his debts must be paid, and he cannot give the whole of his real and personal estate to a person to take it free from the debts. It is all that shall remain after the debts are paid, and that argument is equally answered whether you pay out of income or capital, because "the whole of my estate" includes income, the income to accrue after the man's death as much as the thing which produces the income. Therefore that argument would prove too much.

The words chiefly relied upon were those as to the payment of the remainder. However, similar expressions occurred in several of the cases, and have not been held to be sufficient. In the case of *Wilson v. Halliley* (1), decided by Sir *John Leach* in 1830, we have everything that occurs here. There was a direction, in the first place, to pay a legacy of £50; then an annuity of £100 or £50, as the case might be; and, in the next place, "to pay and satisfy my funeral expenses, and all such debts as shall be due and owing by me, and to levy and raise out of the rents

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(1) 1 Russ. & My. 590.



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—

and profits the sum of £5850." In that case Sir *John Leach*, although he decided that the last-mentioned sum was to be paid out of annual rents and profits, says this: "Inasmuch as the debts can be immediately claimed, to the extent of this purpose, if necessary, a sale or mortgage would certainly be made." That is in the very same will. He reads the words "rents and profits" differently as applied to the debts and as applied to a gross sum which the testator directed to be raised by way of bounty, meaning that, as the debts must be paid, the testator never could intend that the creditors were to wait; and, as I have said before, every word that we have here occurs there.

Then, in *Trafford v. Ashton* (1), Lord Chancellor *Parker* says this: "The words 'profits of lands,' especially when to pay debts or portions, implied any profits that the land would yield, either by selling or mortgaging; and that this had been the constant construction in the like cases." He puts it there as "debts or portions," but he certainly means by that a sum immediately raisable—a gross sum that you cannot help raising.

Then the expressions attributed to Lord *Hardwicke* in *Green v. Belcher* (2) go quite to the same extent. He says: "Though in general where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipts of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell, and as a devise of the rents and profits will at law pass the lands, the raising by rents and profits, is the same as raising by sale." The result is that you must find on the face of the will a clear restriction of the general meaning of words directing you to raise a gross sum payable immediately, or at a day fixed, out of rents and profits; and the words are not otherwise to be read as annual rents and profits. This will does not contain any such plain words. On the contrary, it does contain one passage at least, and possibly more than one passage, in which it is impossible to read the words "rents and profits" as anything but a description of the capital; and, therefore, the burden which is laid upon those who contend it should be restricted to annual rents and profits is not

(1) P. Wms. 415, 418.

(2) 1 Atk. 505, 506.

discharged, and I shall order the corpus of the estate to be devoted to the purpose of raising the amount required for the payment of the debts.

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Then there is a subsidiary question as to whether they should be raised by mortgage or sale. The matter stands in this way: The gift of the estate is between three uncles and an aunt for their lives, and after their decease to the children of the three uncles in equal shares, and only in the case of their dying without any child—all three—then for *William Cleasby*, his cousin, for life, with remainder to his children; and then, if he dies without children, to *Adam Hudson*. The cousin, Mr. *Cleasby*, desires that the estate—a small portion of which only has belonged to the family for any time, the bulk having been bought by the testator—should not be sold, and he offers to advance the money by way of mortgage. The two surviving uncles—who it appears have no children at present, though they may have—desire that the estate should be sold. They have not got that feeling for the family estate which the more distant relative seems to have. They say if you sell the estate an income will be provided for us which we very much desire to have. The remaindermen, both of them, and their possible children, say, though the tenants for life will go without income, we should much prefer that, because there will be a larger property for our child or children, and the question is to whose wishes I should pay the most attention? I have not the slightest hesitation in saying that the wishes of those who come first in the order of taking ought first to receive the attention of the Court. They are first in order as regards the bounty of the testator, and as between themselves and the cousin and his children are to be preferred. As they wish the estate sold, and as the reason they give is a natural and proper one, and this story of it being a family estate has really no application except to two very small farms, which might or might not have belonged at some time to the family, which I can order to be sold, giving liberty to bid to Mr. *Cleasby*, so that he can buy them, there is no reason to depart from the ordinary rule as to there being a sale when there is no reason for a mortgage, and I shall order the estate to be sold.

Solicitors: *W. H. Tattam; Vizard, Crowder & Co.*

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Jan. 11.

SARGANT *v.* READ.

[1876 S. 1.]

*Practice—Injunction and Receiver—Application by Defendant—Rules of Court, 1875, Order LII., r. 4—Partnership Suit—Appointment of a Partner as Receiver and Manager.*

Under the Rules of Court, 1875, Order LII., rule 4, a Defendant in an action may, before judgment, apply for an injunction and a receiver. The Defendant may do so notwithstanding that the Plaintiff has already served notice of motion for the like purpose; and in such case one order will be made on the two motions, but the conduct of the proceedings will in general be given to the Plaintiff.

The circumstances under which one of the members of a dissolved partnership will be appointed manager and receiver considered.

THIS was an action commenced on the 1st of January, 1876, by *William Thomas Sargant* and *William Sargant* against *Thomas George Read*. By the writ the Plaintiffs claimed that the partnership between the Plaintiffs and the Defendant might be deemed dissolved on and from the 31st of December, 1875, the date mentioned in the notice of dissolution served by the Plaintiffs on the Defendant, and that it might be so declared accordingly; that an account might be taken of the partnership dealings, and the partnership affairs wound up; that the amount of the shares of the Plaintiffs and Defendant in the profits and goodwill of the business might be ascertained and declared; that *William Thomas Sargant*, or some other fit and proper person, might be appointed receiver and manager of the business so far as related to any contract subsisting on the 31st of December, 1875; and that the Defendant might be restrained from intermeddling with the partnership assets, and from signing or using the name or style of the firm of "*W. T. Sargant & Son*," and from trading or dealing in or under that name or style. On the 7th of January the Plaintiffs gave notice of motion for the 11th of January asking the appointment of *William Thomas Sargant*, or some other fit and proper person as receiver, without salary, but on giving proper security, and for an injunction according to the terms of the writ.

126 D. 451  
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On the 8th of January the Defendant gave notice of motion for the same day to restrain the Plaintiffs from possessing themselves of or interfering with the partnership assets, and trading under the partnership, style, or firm; and for the appointment of a receiver.

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It appeared that the Plaintiffs and Defendant had carried on business as colonial and metal brokers in *London*. The business was founded by the Plaintiff *William Thomas Sargent*. The Defendant was originally an office boy, and afterwards a clerk of *William Thomas Sargent*, and in 1864 he became his partner, and afterwards his son-in-law. No articles of partnership were signed. The Defendant claimed to be entitled to one-fourth of the capital and profits.

About May, 1874, the Defendant became seriously ill, and had not since been able to attend to business. On the 31st of December, 1875, the Plaintiffs served on the Defendant a notice of dissolution of the partnership.

In carrying on the business of the firm, it was necessary to obtain loans from bankers and others upon personal credit.

*Chitty*, Q.C. (*Crossley* with him), brought on the Defendant's motion, and submitted that, although, under the old practice, & Defendant could not have made such a motion, any party to the cause was now entitled to do so under the Rules of Court, 1875, Order LII., rule 4. He objected to the appointment of the Plaintiff *William Thomas Sargent* as receiver, on the ground that the Plaintiffs would thereby be enabled to acquire the whole goodwill of the business.

*Cookson*, Q.C. (*W. D. Rawlins* with him), for the Plaintiffs, submitted that the Defendant's motion was improper, notice not having been given until after the Plaintiffs had served notice of motion. He asked that an order might be made on the Plaintiffs' motion appointing *William Thomas Sargent* receiver and manager. It was necessary for a person carrying on a business of this sort to pledge his personal credit, and there was little likelihood of a stranger being found who would do this.



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I have no doubt the proper order to make on these motions is an order for a receiver. It is the first instance of an application, under the 4th rule of the 52nd Order, by the Defendant before judgment; but I have no doubt of the jurisdiction of the Court, and that it was intended to confer that jurisdiction in a proper case. In an ordinary suit for taking the accounts of a dissolved partnership it was a mere accident who filed the first bill under the old practice, and it is a mere accident who issues the first writ under the new. Both parties are competent to go to law; one may do it the day before the other; but there is no reason why the preliminary form of serving a writ should be made a matter of necessity, or why the Defendant to the first writ may not, without serving a second, move himself; and I, for one, am by no means desirous of discouraging an application by a Defendant in such a suit as this without compelling him to go through the formality of issuing a writ himself. Therefore I think the Defendant's motion is regular in form and not inconvenient in practice.

It is quite true that in this instance the Plaintiffs gave a notice of motion, but as each party had a right to be Plaintiff for the purpose of taking these accounts and winding up the partnership, it did not at all follow the Defendant was bound to rely on the Plaintiffs bringing on their motion, and was not entitled to give a cross motion. I think the right course to pursue will be to make one order on both motions for a receiver. According to my general rule, I shall give the carriage of that order to the Plaintiffs, as being those who first instituted the proceedings, putting them in the same position as if the Defendant had issued a writ the day after; and the Defendant cannot ask to be in a better position than that.

The only other points remaining are, whether I shall or shall not give leave to the Plaintiffs to carry on the business until the appointment of a receiver—of course if I give that, it must be upon their undertaking to proceed with all possible speed to obtain the appointment—and whether I shall give leave also to the senior Plaintiff to propose himself as receiver. The general rule is to

do neither of these things if opposed; and this being a family case, both are opposed. Now it appears to me that the nature of this business is exceptional in this sense, that it is one of the class of businesses which I may call personal businesses. The business of a professional man is also personal. A broker's business of this kind depends, no doubt, on the individual carrying it on to a much greater extent than an ordinary mercantile business or shop-keeping business. Of course it is not purely personal, any more than the business of a solicitor is purely personal in the sense that you cannot introduce people into it, or that you may not have a goodwill. There may be some goodwill belonging to it, but there is not likely to be a great deal, considering the nature of the business.

Then the mischief, it appears to me, of allowing the business to be carried on is much smaller than that of destroying it, which I should do by ordering its cessation until a receiver was appointed. A business of this kind cannot be allowed to stop even for a day. On that point, therefore, I think there should have been no opposition, and I shall give leave to the Plaintiffs to carry on the business. Of course, in carrying it on, they must carry it on for the purpose of winding it up, and must not pledge the Defendant's credit.

As regards giving liberty to the senior Plaintiff to propose himself as receiver without salary and giving security, it appears to me a case in which I ought to give that leave. It seems the Plaintiffs are entitled on the undisputed figures to rather more than three-fourths of the capital; they are entitled either to three-fourths or four-fifths of the profit; and they are the original owners of the business, who have been carrying it on without any substantial interference on the part of the Defendant for upwards of a year. It appears that the Defendant was unable through ill health to attend to business, but that does not at all affect the fact that they are the persons who carried it on. It appears to me that any danger as to the goodwill is utterly visionary, because, in fact and in substance, brokers in the position of the Plaintiffs have acquired by these means—not assuming any illegitimate means—whatever goodwill there may be; and, although there might be some small sum on

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account of goodwill, I cannot help seeing that allowing the senior Plaintiff to be receiver will not seriously affect the position of the Defendant as regards that point. On the other hand, if I deprive the Plaintiff of the opportunity of being receiver, I might inflict most serious injury on the business. It has been verified by affidavit, and it is a fact so well known that I might almost take judicial notice of it, that brokers in this class of business cannot carry on the business at all without pledging their personal credit to their bankers. You cannot get an indifferent person as receiver to take such an onerous duty upon himself. The only person willing to undertake it would be, no doubt, a person largely interested in the success of the business, which the senior Plaintiff is. I think, therefore, there are in this case sufficient grounds for making an exception to the general rule, and I shall give the senior Plaintiff liberty to propose himself as receiver.

Solicitors: *Bolton, Robbins, & Busk; Carr, Bannister, Davidson, & Morriss.*

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Jan. 12.

### KNATCHBULL v. FOWLE.

[1875 K. 59.]

*Practice—Evidence by Affidavit—Consent by Infant Defendant—Rules of Court, 1875, Order xxxvii., r. 1; Order xxxviii., r. 1.*

The guardian *ad litem* of an infant Defendant is competent to give the consent requisite for taking evidence by affidavit under the Rules of Court, 1875, Order xxxviii., rule 1.

THIS was a suit by trustees of a marriage settlement instituted for the purpose of obtaining the direction of the Court as to the execution of the trusts. The Defendants included a married woman and infants. There was no conflict as to the facts; and it was desired that the evidence should be given by affidavit.

*Stirling* said that a doubt had been suggested whether parties under disability could give the requisite consent to have the evidence taken by affidavit, and asked that, if necessary, an order for the purpose might be made under Order xxxvii., rule 1.

*Similar held also in Fyfe v. Fyfe*  
111 U.S. 413. 24 Q. 905: 33 F. 779. 1 C. 17

The MASTER OF THE ROLLS said that an order was unnecessary. A guardian *ad litem* was competent to give his consent to any matter relating to the conduct of the cause, and could consent to the evidence being taken by affidavit.

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Solicitors: *H. F. & E. Chester.*

## COURT v. BUCKLAND.

[1875 C. 187.]

M. R.

1876

Jan. 13.

*Will—Trust for Sale of Real and Personal Estate—Proceeds of Sale of Real Estate included in Gift of Residuary Personal Estate.*

Testator, by his will, made in 1872, after certain legacies, devised his real estate and bequeathed the residue of his personal estate to trustees upon trust to sell, and to dispose of the net moneys to arise from such real and residuary personal estate (after payment of his debts, funeral and testamentary expenses, and legacies), "according to the trusts thereafter declared concerning the same," with a discretionary power for the trustees to postpone the sale, and let and manage his unsold real estate, and with a declaration that the unsold real estate and outstanding personal estate should be subject to the trusts thereafter declared concerning the said net moneys, and that the rents thereof should be annual income for the purpose of the same trusts, and such real estate should be considered as converted in equity. And he directed his trustees to stand possessed of the net moneys to arise as aforesaid upon trust to pay an annuity, and subject thereto, and to the payment of his debts, legacies, funeral and testamentary expenses, to stand possessed of his "residuary personal estate" upon trust as to one moiety for his son absolutely, and as to the other moiety, for his daughter for her life, with remainder for her children:—

*Held*, that though there was no express direction as to the proceeds of the sale of the real estate, they did not go to the heir-at-law, but were included in the trusts of the residuary personal estate.

*JOHN BUCKLAND*, the testator in the cause, by his will, dated the 15th of November, 1872, appointed the Plaintiffs, *John Court* and *Herbert Monckton*, to be trustees and executors of his will, and after certain pecuniary and other legacies, and a devise of his trust estates to his trustees, proceeded as follows:—

"I devise all the real estate to which I shall be entitled at my decease (except estates vested in me as trustee or mortgagee), and



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I bequeath the residue of the personal estate to which I shall be then entitled unto and to the use of my said trustees, their heirs, executors, administrators, and assigns, respectively, upon trust to sell my said real estate and so much of my said residuary personal estate as shall be of a saleable nature, and to get in the rest of my residuary personal estate, and to dispose of the net moneys to arise from such real and residuary personal estate (after payment of my just debts and funeral and testamentary expenses and legacies, and the expenses incident to the execution of the preceding trust) according to the trusts hereinafter declared concerning the same: Nevertheless, I give to my said trustees discretionary power to postpone for such period as to them shall seem expedient the sale of all or any part of my real estate, and the getting in, sale, or conversion of such parts of my residuary personal estate as shall consist of stocks, funds, securities, shares in societies, companies, or institutions, or other pecuniary investments of any description whatsoever; and also to let from year to year, or for any term not exceeding seven years in possession, at the best rent, and to insure, repair, and manage, at their discretion, the unsold real estate: But I declare that, from the time of my decease, the unsold real and outstanding personal estate shall be subject to the trusts hereinafter declared concerning the said net moneys, and the rents, interest, and yearly produce thereof shall be deemed annual income for the purposes of the same trusts, and such real estate shall be transmissible as personal estate, and be considered as converted in equity."

The testator then directed his said trustees to stand possessed of the net moneys to arise as aforesaid upon trust, in the first place, to appropriate a sufficient sum as a fund, and invest the same so as to produce an annuity of £100, to be payable during the life of his wife; and he declared that after her death the same should sink into and form part of his residuary personal estate; and subject to the said annuity, and to the payment of his debts, legacies, and funeral and testamentary expenses, he directed his trustees to stand possessed of his residuary personal estate in trust, as to one moiety, for his son *James Buckland*, and, as to the other moiety, for the separate use of his daughter *Emma*, the wife of *Henry Noakes*, for her life, for her separate use, and after her decease, for

her children, as she should appoint, and in default of appointment, for her children as therein mentioned.

The testator died on the 28th of April, 1874; his said wife and his son *James Buckland* having died in his lifetime.

*James Buckland*, the son, died intestate, and leaving a widow, to whom letters of administration to his estate were granted, and a son, *James Robert Buckland* (who was heir-at-law of the testator), and other children him surviving.

The suit was instituted by the trustees against the widow and children of *James Buckland*, the son, and *Emma Noakes* and her husband and children, as Defendants. The bill prayed that it might be declared whether, upon the true construction of the will, the proceeds of the sale of the real estate were included in the directions contained in the will as to the ultimate trusts of the testator's residuary personal estate.

*G. W. Collins*, for the Plaintiffs.

*Rigby*, for the widow and younger children of *James Buckland* the son, contended that upon the true construction of the will the proceeds of the sale of the testator's real estate fell into and formed part of the residuary personal estate, as in *Spencer v. Wilson* (1).

*E. Cutler*, for *Emma Noakes* and her children, supported the same contention.

*G. O. Edwards*, for *James Robert Buckland*:—

In this will there is not an absolute trust for conversion of the real estate, but only subject to the payment of the testator's debts, funeral and testamentary expenses, and legacies. The result, therefore, is, that so far as the proceeds of the sale of the real estate are not required for the above purposes, there is an intestacy, and the heir is entitled: *Amphlett v. Parke* (2).

JESSEL, M.R.:—

The question I have to determine is whether, on a perusal of the whole will of this testator, I ought to come to the conclusion

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(1) Law Rep. 16 Eq. 501.

(2) 2 Russ. & My. 221.

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that he has disposed of the proceeds of the sale of his real estate, or that he has died intestate with regard to his real estate. If I am to come to the latter conclusion, it is difficult to understand why he has given all these directions with regard to his real estate. He has directed it to be sold by his trustees. He has directed that, until sale, it shall be subject to "the trusts hereinafter declared" concerning the net moneys arising from the sale of the real estate and the personal estate; that the income—that is, the rents, interest, and yearly produce—shall be deemed annual income for the purpose of the same trusts, it being alleged by the heir-at-law that there are no such trusts; and that such real estate shall be transmissible as personal estate, and shall be considered as converted in equity. Then he directs, out of the net moneys, provision to be made for an annuity, and afterwards he gives his residuary personal estate subject to the annuity, debts, and legacies, and there the will ends.

What possible object could he have had in so directing the disposition of his real estate? There is no trust to pay the debts and legacies out of the real estate, because the words used are "after payment," which is a mere charge; and, therefore, the whole effect of the will, according to the contention advocated by the heir-at-law, would be to charge the debts and legacies on the real estate as a subsidiary fund in aid of the personal estate, if the personal estate proved deficient—a charge not necessary according to law now, but still having some meaning, though a very little meaning, inasmuch as the trustees must have paid the debts even without express direction, the will being dated in the year 1872. But what would be the effect of it? The effect of it would be to make a provision for the personal estate proving deficient. How is that consistent with a beneficial gift to the testator's only children of the residuary personal estate? It is not reasonable to attribute to the testator an intention to charge his real estate in aid of his personal estate after he had shewn that he contemplated there being a residue of personal estate for the benefit of his son and daughter. Therefore it appears to me that it is not a rational construction of the will to assume that the directions as to the sale of the real estate were put in merely for the purpose of providing for the personal estate proving deficient.

I now come to the second set of provisions. As regards debts and legacies, if charged on real estate, it is immaterial whether the income of the testator's real estate is to be treated as income or as capital. The provision, therefore, for treating the rents of the real estate while unsold in the same manner as the income of the net moneys to arise from his real and residuary personal estate, could have no meaning at all upon the theory of the heir-at-law. It has a very manifest and obvious meaning if it is meant that some one is to take the income beneficially, because it excludes the rule which we are all familiar with, under which the beneficiaries do not take the actual income, but an income ascertained upon the principle of converting the whole estate into money and investing it in consols.

Then, again, it may be urged on behalf of those who contend against an intestacy that it is not very likely that a testator who has given to his trustees a mixed fund of real and personal estate for the payment of debts and legacies, and an annuity, and has then given his residuary personal estate in trust for his children, should intend to die intestate as regards his real estate. He certainly has taken a great deal of trouble to die intestate, if such was his intention, as regards his real estate. But the difficulty does not stop there. When I look at the words of the will, I think they are open, in the very wording of the gift, to two constructions. "Residuary personal estate" in this will does not mean the strict residue, but it means the residue after taking out of the personal estate certain objects which are specifically given. The trust is to sell the real, and so much of the residuary personal estate as shall be of a saleable nature, for the payment of debts and legacies. The real estate and residuary personal estate include, if I may call it so, the debts and legacies, or rather the fund which is to be applied in payment of debts and legacies.

In the final clause the testator directs his trustees to stand possessed of his residuary personal estate, subject to the annuity and to the payment of his debts and legacies, and funeral and testamentary expenses. Therefore what he has given under the words "residuary personal estate" is, in fact, the whole estate after taking out the legacies mentioned in the first part of the will. And, unless the trusts of the residuary personal estate are

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the trusts referred to in the clause I am about to read, there are no such trusts at all. He says, "to dispose of the net moneys to arise from such real and residuary personal estate (after payment of my just debts and funeral and testamentary expenses and legacies, and the expenses incident to the execution of the preceding trust) according to the trusts hereinafter declared concerning the same." The word "same" may, grammatically, refer to more than one antecedent. It would, perhaps, more naturally refer to "net moneys," but the answer is, that there is no such declaration at all, except for the payment of the annuity, to be found in the will, because the final gift is not a gift of the net moneys in words, but of the residuary personal estate, which does not answer the description of net moneys, for they were to arise from the real as well as the personal estate. On the other hand, if you read "same" to refer to the last antecedent, "residuary personal estate," you do find trusts, which are the only trusts which dispose of the property to any person beneficially. The sentence would thus read, "to dispose of the net moneys to arise from my real and residuary personal estate (subject to the payment of my just debts, and so on), according to the trusts hereinafter declared concerning my residuary personal estate." That seems to me to be, on the context, a permissible reading.

There is only one more observation that I have to make. The testator directs that, until the sale, the real estate shall be transmissible as personal estate, and be considered as converted in equity. That has absolutely no meaning at all, unless there is a disposal of the proceeds of sale of the real estate; for, as was decided previously to, and was recognised by Lord *Brougham* in, the case of *Amphlett v. Parke* (1), the mere direction that the proceeds of sale shall be considered as personal estate does not prevent the heir-at-law taking. Another interpretation appears to me to be at least equally admissible, namely, that when the testator directs the proceeds of sale of his real estate to be considered as personal estate, he means that the proceeds shall go to his next of kin. But, according to the cases, unless he actually says so, there will not be enough to displace the heir-at-law. According to the argument for the heir-at-law, these words are absolutely useless:

(1) 2<sup>d</sup> Russ. & My. 221.

but, according to the argument on the other side, they are most useful, because in case the son should die before the real estate was converted, or in case the daughter's children should die before the real estate was converted, the property would then go to the person who would take the personal estate, and not to their respective heirs-at-law.

It appears to me, therefore, looking at the various details which I have mentioned, that the intention of the testator was to give not merely his residuary personal estate, but the net proceeds of sale of his real estate, to the same persons, and I shall so declare.

Solicitors: *Monckton, Long, & Co.*, agents for *Monckton, Son, & Tatham, Maidstone*; *Kingsford, Dorman, & Kingsford*, agents for *Beale, Hoar, & Beale, Maidstone*.

### *In re* HAYCOCK'S POLICY.

*Assurance Society—Policy Money—Payment into Court under Trustee Relief Act—Notice of Assignment—Payment out of Court—Costs—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.*

*A.* assured his life, and in March, 1852, assigned the policy to *B.* absolutely. *B.* in December, 1869, assigned the policy to *C.* absolutely. In March, 1875, *A.* died. The office admitted *C.*'s title to the policy money, subject to production of evidence that an assignment by way of mortgage made by *A.* in March, 1851, of which the office had notice, but on which no claim had ever been made, was satisfied; and on *C.*'s declining to comply with the requisition, in July, 1875, paid the money into Court under the *Trustee Relief Act* :—

*Held*, that the *Trustee Relief Act*, until extended by the 6th sub-section of sect. 25 of the *Judicature Act*, 1873, did not enable an assurance society having notice of conflicting claims to pay policy moneys into Court, unless the moneys were the subject of a trust; but that the objection could not be entertained on a petition praying payment out of Court of moneys so paid in :

*Held*, also, that the requisition was proper, inasmuch as, if the mortgage had not been satisfied, the mortgagee might, by virtue of the *Policies of Assurance Act*, 1867 (30 & 31 Vict. c. 144), have sued the office in his own name on his assignment :

*Held*, also, that the assurance society were entitled to their costs as between solicitor and client, but not to their charges and expenses.

THIS was a petition under the *Trustee Relief Act* for payment out of Court of the proceeds of a policy.

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Robert Haycock, deceased, having in December, 1839, assured his life with the *Law Life Assurance Society* for £1000, on the 1st of March, 1851, assigned the policy by way of mortgage to *Joseph Jobson*, to secure a sum not exceeding £300 and interest. On the 23rd of March, 1852, *Robert Haycock* assigned the policy absolutely to *Edward Haycock*, who on the 24th of December, 1869, assigned it absolutely to the Petitioners, his daughters *Elizabeth Anne Haycock*, *Margaret Haycock*, and *Fanny Salter*, as tenants in common. Notice of each assignment was given in due course to the office.

Robert Haycock died on the 3rd of March, 1875. Shortly after his death, the Petitioners applied through their solicitor to the society for payment of the policy moneys, and the claim was admitted, subject to production of *Jobson's* assignment, or evidence that it had been lost or destroyed, and the claim under it satisfied.

The Petitioners' solicitor declined to comply with the above requisition, on the ground that his clients had no previous knowledge of the existence of *Jobson's* assignment, which he contended, as no claim had ever been made under it, must be regarded as satisfied.

The society persisted in their requisition, and, after some correspondence, the material portion of which will be found stated in the judgment of the Master of the Rolls, paid £1817 1s. 10d. (being £1831, less their costs, charges, and expenses) into Court on the 1st of July, 1875.

The Petitioners then caused inquiries to be made for *Jobson*, who was found to be dead, and having obtained a disclaimer from his widow and legal personal representative, they presented the petition, asking that the Respondents, the *Law Life Assurance Society*, might be ordered to pay the costs of and incidental to the petition and of the payment into Court.

Fischer, Q.C., and *Phear*, for the Petitioners :—

The only question is as to the costs occasioned by the payment into Court. On this point we submit that the office had no right to pay the policy money into Court. It was a mere debt, and all the cases involving the right of an assurance society to pay policy

money into Court are cases in which the money belonged to some trust within the meaning of sect. 1 of the *Trustee Relief Act*, which is not the case here: *In re Hall* (1); *In re United Kingdom Life Assurance Company* (2); *In re Webb's Policy* (3). The provisions of the *Judicature Act*, 1873, s. 25, sub-s. 6, for a debtor paying the debt into Court in case of a disputed claim, do not apply to this case, which must be decided on the law as it stood prior to the commencement of that Act. Besides, the policy money was not the subject of a conflicting claim. There never was an actual claim on the part of *Jobson*; there was only notice of an assignment twenty-four years old, under which no claim had ever been made. At any rate, the office is not entitled to any charges and expenses: *In re Webb's Policy*; *In re Kerr's Policy* (4).

Kekewich, for the *Law Life Assurance Society*, was not called on.

JESSEL, M.R.:—

A Mr. *Haycock* effected a policy with the *Law Life Assurance Office*. On the 1st of March, 1851, he made an assignment by way of mortgage of the policy to one *Joseph Jobson* to secure a sum of money. Notice of that assignment was given in due course to the office. Mr. *Haycock* then assigned the policy to another Mr. *Haycock*, who seems to have given it to his daughters; and the result was, that the persons claiming under the second Mr. *Haycock*, on the death of the original Mr. *Haycock*, whose name was *Robert*, became entitled to the policy moneys. *Robert Haycock* died in March, 1875, and the persons entitled to the policy moneys applied to the office for payment, and gave the usual proofs. The office said, We have notice of an assignment by *Robert Haycock*, and we cannot pay you unless you get rid of *Jobson*. I should have thought a more reasonable requisition could not have been made, and for the simple reason that, by the *Policies of Assurance Act*, 1867 (30 & 31 Vict. c. 144), *Jobson* was the person entitled to sue at law on the policy, and I have always understood that an assurance office has a right to a legal discharge. The

(1) 10 W. R. 37.

(2) 6 N. R. 59.

(3) Law Rep. 2 Eq. 456.

(4) Ibid. 8 Eq. 331.

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Act is perfectly clear, and it was not disputed in argument that it would have entitled *Jobson*, if living, to sue on the policy. The answer to the requisition was, "Find out *Jobson* for yourselves. A more unreasonable answer cannot be conceived. It was said, on the part of the persons entitled to the policy, that *Jobson* did not claim. But it turns out that he is dead, which is a good reason why he did not claim.

In such a case, what is an assurance office to do? The mortgagee may be abroad, and may not know of the death of the assured, or he may have died, as *Jobson* has, without appointing a legal personal representative. That would be no answer when the legal personal representative was constituted. In a case now pending, my attention has been called to what is still the case at common law—for there is still common law, although there are now no Common Law Courts—namely, that if a man dies intestate, there is no bar to the claim of his legal personal representative until administration has been taken out. Therefore, if *Jobson* died intestate, and had no legal personal representative, then, whensoever administration was taken out, the administrator might sue on the policy, and the *Law Life Office* would have no defence.

Under these circumstances, the solicitor to the *Law Life Office* wrote on the 9th of June, when the policy was becoming payable, "The directors ask the production of the deeds of which the society has received notice, or some evidence that they have been lost or destroyed, and the claims thereunder satisfied. And, on consideration, I feel that you will think the requisition only reasonable and proper." The answer from the claimants' solicitor was this: "Let me remind you that the charge you inquire about is twenty-four years old. If you think it is reasonable and proper to make inquiries whether such alleged charge is still outstanding or has been satisfied, I certainly shall not gainsay you, nor can my clients have any valid objection to your doing so. What they contend is, that, so far as they are concerned, they have answered your requisition, and can deal with it no further. They never so much as heard of it until a month ago."—Why should they hear of it? They were not the assignees of the policy, but they claimed by derivative title under some voluntary gift.—"They don't know Mr. *Joseph Jobson*, or even his address. Mr. *Gordon*, whom

you mention as his solicitor, has been dead for ten years or so, and they object to be at the costs of substantiating any claim other than their own." I must say this is a wonderful answer to a reasonable requisition. They have notice of a legal assignment, they are asked to account for the legal owner, and their answer is, Inquire for yourselves.

The answer of the *Law Life Office* was this: I am reading it to shew that it was not quite so precipitate as has been alleged. "You must take a little more trouble in endeavouring to trace the missing deeds; and if, after a further search, you find the deed is not forthcoming, and will make a declaration shewing what you have done, the matter shall go again before the board. The directors may then pay you on an indemnity."

The answer to that was:—"I am favoured with yours of yesterday's date, intimating that I must take a little more trouble. In reply, I beg to refer you to my former letter, as containing my clients' final determination, and I venture to ask you to be equally candid as regards your society's intention." After that, ten days before the policy money would begin to bear interest, but not until then, the society paid the policy money into Court.

Assuming they were entitled to do so, anything less precipitate or more reasonable I have never seen. They dared not pay the claim without getting rid of the legal owner of the policy, who was entitled to sue them. They were not the persons to make inquiries after *Jobson*. The former owner of the policy had assigned it, and had given to them, or had allowed the assignee to give to them, notice of the assignment. It was for the claimants to clear the title by getting rid of *Jobson's* assignment, if they could. They presented their petition for payment out of Court of the money, and then found that they must first get rid of *Jobson's* assignment. So they then did what they ought to have done before, namely, made inquiries, and they found that *Jobson* was dead and had a legal personal representative. They went to his legal personal representative, and she said, I am satisfied the mortgage was paid off long ago, and I will disclaim. Her disclaimer perfected their title. Then they bring on their petition, and gravely ask me to make the *Law Life Assurance Society* pay the costs. They say, first, that the office was not entitled to pay

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the money into Court under the *Trustee Relief Act*. I should be sorry if what I am going to say should cause further expense in these matters. The privilege of paying money into Court under this Act has been largely, and perhaps, on the whole, very beneficially, used by assurance societies; but I cannot find this privilege in the Act. It is an Act for the relief of trustees only. There are decisions that a mere stakeholder—whatever that may be—is a trustee within the Act; but there was a trust in each of them (for the Act applies not only to trustees, but also to persons holding money belonging to any trust), with the exception of *In re United Kingdom Life Assurance Company* (1), a case which is so obscure as to its facts that I cannot say whether there was a trust or not. In the case of *In re Webb's Policy* (2) the fund was subject to a trust for two creditors. In the case of *In re Hall* (3) the fund was subject to a trust for Mr. Hall's family. And I should guess from the report of *In re United Kingdom Life Assurance Company* that there also the fund was subject to a trust.

But in the absence of trust, I cannot find on what principle a mere debtor, which for this purpose an assurance society is, is entitled to avail itself of the provisions of an Act passed for the relief of trustees. In the present case the fund appears to me to be wholly without the purview of the Act; and therefore, if the Petitioners had passed by the payment into Court, and insisted that I have no jurisdiction, I should have said, entertaining the views I do, that I have no jurisdiction under the Act. But that is not the course they have taken. I have no jurisdiction to deal with this fund, except under the Act, and how can I listen to an argument by the Petitioners asking me to exercise the jurisdiction, except upon the assumption that they admit my jurisdiction?

A similar point, not exactly the same, was decided by Vice-Chancellor James in the case of the *London Marine Assurance Association* (4), and followed by myself in *Ex parte Hargrove & Co.* (5), where an argument was brought forward that there was no company in existence which could be properly wound up, and therefore no winding-up order. The answer was, that although

(1) 6 N. R. 59.

(3) 10 W. R. 37.

(2) Law Rep. 2 Eq. 456. 12 Jan. (4) Law Rep. 8 Eq. 176.

(5) Law Rep. 10 Ch. 545, n.

21.585.
11.58.34 Bean 456. 11 Jan 21.58.424

there was no jurisdiction to make that order, yet a party coming in under it could not avail himself of the fact that there was no jurisdiction. In the same way it appears to me that the Petitioner coming to the Court under the *Trustee Relief Act* cannot say the payment into Court was not authorized by the terms of that Act if in other respects the payment into Court was properly made. As I said before, I think it was so made.

I see no reason for departing from the decisions which give no charges or expenses to a debtor of this kind. Therefore, on the *Law Life Assurance Society* submitting to have the sum retained by them on payment into Court included in the taxation, I shall direct the taxation of their costs of this petition, and of their affidavit on payment into Court, as between solicitor and client. If those costs exceed the sum they have retained, they will get the difference out of the fund, and if they are less, they will pay the difference.

Solicitor for Petitioners: *C. Mallam.*

Solicitor for *Law Life Assurance Society*: *J. S. Bockett.*

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In re PATENT COCOA FIBRE COMPANY.

Winding-up Petition—Withdrawal by Petitioner—Opposing Creditors' Costs of Appearance.

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1876
Jan. 15.

Where a creditor who has presented a winding-up petition dismisses his petition at the hearing, creditors who have not been served appearing to oppose the petition are entitled to their costs of appearance.

THIS was a creditors' petition for winding up the *Patent Cocoa Fibre Company, Limited*. The petition had been duly advertised, and was served on the company only.

Daniel Jones, for the Petitioner, when the case was called on, elected to dismiss the petition.

Whitehorne, for the company, assented.

Chitty, Q.C., and *Sidney Woolf*, for a creditor who had presented

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a winding-up petition attached to another branch of the Division, and

Ingle Joyce, for another creditor, asked for their costs of appearance, stating that they appeared, in consequence of the advertisement of the petition, to oppose it, and had received no notice of its intended withdrawal.

Daniel Jones submitted that creditors who had not been served were not entitled to their costs of appearing to oppose the petition, for the Petitioner was *dominus litis*, and had a right to dismiss his petition; and if he brought it on and obtained an order to wind up the company, no costs would be given to persons who appeared to oppose: *Buckley* on the Companies Acts (1).

JESSEL, M.R. :—

The exact point has not been decided, but I find it has been decided in principle. A creditor presents a petition for winding up a company, and when the petition is called on he elects to withdraw it. In other words, he declines to open it, and submits to have it dismissed. The result is, that the Court cannot even look at the petition, and can know nothing about it beyond the mere fact that a petition has been presented, which, for some reason or other, the Petitioner does not choose to open. Thereupon counsel say they appear for persons alleging themselves to be creditors of the company, who are attracted hither by the advertisement of the petition, and intended to oppose it if opened, and they ask for their costs of appearance. I think they are entitled to their costs. The authorities are in favour of the view that I take. First, there is the case of *In re Marlborough Club Company* (2). In that case the petition had not been served on the company, or any person, but the company and some shareholders appeared, and it was contended, on the part of the Petitioners, that if they appeared they did so voluntarily and at their own risk, and were not entitled to costs. But Vice-Chancellor *Kindersley* said: "With regard to the company, I have no doubt but that they are entitled to their costs. It is contended that the company has not been served, and therefore is not entitled to

(1) 2nd Ed. p. 206.

(2) Law Rep. 1 Eq. 216, 218.

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appear on the petition. But there is no foundation for that argument. When the directors became aware, through the advertisement, that the petition for winding up had been presented, it was necessary for them to take steps to oppose it; and every person interested who had such notice was entitled to come forward and oppose the petition for winding up, for which petition, it appears to me, there were no good grounds. The company, therefore, must have their costs." And His Honour came to a similar conclusion with regard to the costs of the shareholders who appeared.

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The next is the case of *In re Home Assurance Association* (1). In that case the petition was presented by a judgment creditor, and from the statements in the report there is no doubt but that it was a good petition. The Petitioner asked to withdraw it, as his debt had been secured. It was then argued, on the part of another creditor, that when once a petition has been presented for a winding-up order, the Petitioner has no right to withdraw it; but Vice-Chancellor *Wickens* said he must assume that the Petitioner was *dominus litis*, and allowed him to dismiss his petition with costs, to include the costs of the creditor who took the objection.

A similar point arose before Vice-Chancellor *Bacon* in the case of *In re Hereford and South Wales Waggon and Engineering Company* (2). In that case the creditors had received notice that the debt of the petitioning creditor had been paid and that the petition would be dismissed; but they appeared, nevertheless, and the Vice-Chancellor held that the opposing creditors (the report is not so distinct as it might be, for it would seem that there were also creditors interested in supporting the petition who appeared) were entitled to appear, and would have their costs. The petition will be dismissed with costs, including the costs of the creditors who appear.

Solicitors: *Cowdell, Grundy, & Browne*, agents for *Walter & Durham, Kingston-on-Thames*; *J. H. Crump*; *Robert King*.

(1) Law Rep. 12 Eq. 59.

(2) Law Rep. 17 Eq. 423.

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Jan. 22.

In re NEW BUXTON LIME COMPANY.

DUKE'S CASE.

*Winding-up—Contributory—Subscriber of Memorandum—Preference Shares—
Ordinary Shares—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 8, 23.*

50k D. 526
12k D. 4527
22k D. 354
364

The memorandum of association of a company irrevocably binds a subscriber thereof to contribute the proportion of the capital for which he subscribes, but it does not bind him irrevocably as regards matters not required by the Companies Acts to be stated therein.

A person who subscribes the memorandum of association of a company for preference shares may take an equivalent amount of ordinary shares instead.

By the memorandum of association the capital of a company was divided into so many A, or ordinary shares, and so many B, or preference shares, carrying a right to a preferential dividend. *D.* subscribed the memorandum of association for fifty B shares. He afterwards became a director of the company, and thinking it unfair to take his qualification entirely in preference shares, applied for twenty-five A shares and twenty-five B shares, and those shares were allotted to him. There was evidence to shew that the twenty-five A shares and twenty-five B shares were agreed to be taken instead of the fifty B shares for which *D.* signed the memorandum. The company was ordered to be wound up, and the liquidator sought to place *D.* on the list of contributories for fifty B shares in addition to the twenty-five A and twenty-five B shares:—

Held, that *D.* was a contributory for twenty-five A and twenty-five B shares only.

Fowler's Case (1) questioned.

THE *New Buxton Lime Company, Limited*, was registered in December, 1872. The memorandum of association provided as follows:—

“The capital of the company is £100,000, divided into 10,000 shares of £10 each, of which £90,000 are ordinary, or A shares, and £10,000 are preference, or B shares. The B shares take a dividend of £8 per cent. before the A shares receive anything. After the A and B shareholders have received a dividend of 8 per cent. the profits are to be shared equally among them without distinction or preference.”

By the articles of association the holding of fifty shares on

which the calls had been paid up constituted the qualification of a director.

Mr. *R. R. Duke* signed the memorandum of association for fifty B shares. He afterwards agreed to become, and he acted as, a director.

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In February, 1873, the prospectus of the company was considered at a board meeting, and Mr. *Duke* suggested that it would look unfair for the directors to take their qualification wholly in B or preference shares; and after some discussion, it was agreed (according to Mr. *Duke's* evidence) that, instead of the fifty B shares for which he and other directors had subscribed, they should take twenty-five B shares and twenty-five A shares.

A prospectus, which was issued on the 17th of February, 1873, and was proved to have been circulated to some extent, contained the following passage, printed in red ink:—

“Notwithstanding that the directors and their friends have signed the memorandum and articles of association for B or £8 per cent. preference shares only, they have agreed to take one-half of their subscriptions in ordinary or A shares, and have altogether subscribed for £6000 of the capital now offered.”

In another prospectus, issued on the 24th of February, 1873, the passage in red ink stood as follows:—

“The directors and their friends have subscribed for upwards of £6000 of the capital now offered.”

At a board meeting, held on the 30th of March, in accordance with the advice of the then solicitor of the company, Mr. *Duke* filled up and signed the usual form of application for twenty-five A and twenty-five B shares. There was nothing in the form of application to identify these shares with those for which Mr. *Duke* signed the memorandum of association. At the same meeting twenty-five A and twenty-five B shares were allotted to Mr. *Duke*. No other shares were ever allotted to him; and his name was entered in the register of shareholders for these twenty-five A and twenty-five B shares only.

In 1874 the company was ordered to be wound up; and the official liquidator proposed to settle Mr. *Duke* on the list of con-

M. R. tributories for fifty B shares in addition to the twenty-five A and
1876 twenty-five B shares for which he was on the register. The ques-
DUKE'S CASE. tion of Mr. *Duke's* liability to be so settled was adjourned into
— Court.

Ince, Q.C. (*Dryden* with him), for Mr. *Duke*, was stopped by the Court.

Cookson, Q.C., and *Northmore Lawrence*, for the official liquidator, relied on *Fowler's Case* (1). They also contended that there was no sufficient evidence that the twenty-five A and twenty-five B shares were applied for, instead of the fifty B shares for which *Duke* signed the memorandum of association. They referred to *Teasdale's Case* (2).

JESSEL, M.R. :—

With the greatest respect for the learned Judge who decided *Fowler's Case*, I should have great difficulty in following it. It is distinguishable from the present case, but I must say it seems to me to be opposed to the true sense of the Act of Parliament. In *Fowler's Case* each director was required to take twenty-five shares of £20 each; that is to say, to contribute £500 to the assets of the company. *Fowler* made a mistake; he thought he was to take twenty shares of £25 each, and he applied for these shares representing the same proportion of capital. After the company was ordered to be wound up, the liquidator insisted on *Fowler* performing the contract he had entered into by becoming a director of the company. He said, "It has been performed." It might have been held that he ought to have taken five more shares; but, as it seems to me, there was nothing to justify the Court in fixing him with twenty-five additional shares: and I should have thought that both good law and good sense would have been satisfied by adopting Mr. *Fowler's* view of the transaction.

I think, however, that this case is fairly distinguishable. The Act of Parliament says (sect. 8): "That each subscriber of the

(1) Law Rep. 14 Eq. 316.

(2) Law Rep. 9 Ch. 54.

memorandum of association shall write opposite to his name the number of shares he takes." Now Mr. *Duke* subscribed for fifty B shares. That letter B introduces a term not required by the Act; sect. 8 only requires the number of shares to be stated. Then sect. 23 says: "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed." Members for what? Members for the number of shares set opposite their name; not for shares of any particular quality. It is quite true that the memorandum is also a contract independently of the Act of Parliament; but then as regards those terms of the contract, which the Act does not require to be stated, it is revocable. It is irrevocable as regards the number of shares, by which, I think, is meant the proportion of capital, to be taken by the subscriber; but all that the Act requires of Mr. *Duke* to do is to appear on the register as the holder of fifty shares. He does so appear; he holds twenty-five A shares and twenty-five B shares. Of course the shares for which the subscriber of the memorandum appears on the register must not be of a totally different kind from those for which he subscribed; but here there is no difference as regards creditors; the only difference is as regards the other shareholders of the company; in fact, Mr. *Duke* has given up the right to a preferential dividend on twenty-five out of the fifty shares for which he subscribed the memorandum. It is said it was incompetent for him to release that right; but why? Before registration, the contract contained in the memorandum may be varied, or rescinded or modified; why may it not be modified after registration in regard to matters as to which the Act of Parliament does not make it irrevocable? It cannot by any possibility be said that the Act of Parliament prevents a subscriber from giving up something. The Act does make the memorandum irrevocable as regards the amount of capital subscribed for, but it does not say that if the memorandum contains any other particulars they may not be varied.

His Lordship then went through the facts, and came to the conclusion that there was an agreement (as stated by Mr. *Duke*)

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DUKE'S CASE.

M. R. that the twenty-five A and twenty-five B shares should be taken
 1876 instead of the fifty B shares; that this agreement had been acted
 DUKE'S CASE. upon and made public; and that Mr. *Duke* could only be settled
 — on the list of contributories for twenty-five A and twenty-five B
 shares.

Solicitors: *Matthews & Greetham; Chester, Urquhart, & Co.*

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 1876
 Jan. 27.

PROVIDENT PERMANENT BUILDING SOCIETY *v.*
 GREENHILL.

[1875 P. 102.]

*Practice—Defendant in Contempt—Pending Suit—Rules of Court, 1875,
 Order XIII., r. 9; Order XXIX., r. 10.*

Where a Defendant in a suit pending on the 1st of November, 1875, had failed to enter an appearance or put in an answer:—

Held, that the cause should proceed under the new practice, and the bill be treated for all purposes as if it were the Plaintiff's statement of claim, so that the Plaintiff might proceed under Order XIII., rule 9, and Order XXIX., rule 10.

Culley v. Buttifant (1) distinguished.

THIS was a motion on behalf of the Plaintiff that he might be at liberty to proceed with the cause in the same manner as it would have been proceeded with in the High Court of Chancery previous to the coming into operation of the Judicature Acts, or for directions as to how the cause should be proceeded with.

The bill was filed on the 11th of June, 1875, and was served on the several Defendants, who were also subsequently served with interrogatories; but one of the Defendants, *Alfred Greenhill*, failed to enter an appearance or to put in his answer. The Plaintiff had not entered an appearance for him.

Cozens-Hardy, for the Plaintiffs, referred to *Culley v. Buttifant* and Rules of Court, 1875, Order XIII., rule 9.

Phear, for Mr. Greenhill.

See *1875/188*.

(1) *Ante*, p. 84.

See *Cozens-Hardy*, *1875/188*, *VC* *1875*, *188*, *189*, *190*, *191*, *192*, *193*, *194*, *195*, *196*, *197*, *198*, *199*, *200*, *201*, *202*, *203*, *204*, *205*, *206*, *207*, *208*, *209*, *210*, *211*, *212*, *213*, *214*, *215*, *216*, *217*, *218*, *219*, *220*, *221*, *222*, *223*, *224*, *225*, *226*, *227*, *228*, *229*, *230*, *231*, *232*, *233*, *234*, *235*, *236*, *237*, *238*, *239*, *240*, *241*, *242*, *243*, *244*, *245*, *246*, *247*, *248*, *249*, *250*, *251*, *252*, *253*, *254*, *255*, *256*, *257*, *258*, *259*, *260*, *261*, *262*, *263*, *264*, *265*, *266*, *267*, *268*, *269*, *270*, *271*, *272*, *273*, *274*, *275*, *276*, *277*, *278*, *279*, *280*, *281*, *282*, *283*, *284*, *285*, *286*, *287*, *288*, *289*, *290*, *291*, *292*, *293*, *294*, *295*, *296*, *297*, *298*, *299*, *300*, *301*, *302*, *303*, *304*, *305*, *306*, *307*, *308*, *309*, *310*, *311*, *312*, *313*, *314*, *315*, *316*, *317*, *318*, *319*, *320*, *321*, *322*, *323*, *324*, *325*, *326*, *327*, *328*, *329*, *330*, *331*, *332*, *333*, *334*, *335*, *336*, *337*, *338*, *339*, *340*, *341*, *342*, *343*, *344*, *345*, *346*, *347*, *348*, *349*, *350*, *351*, *352*, *353*, *354*, *355*, *356*, *357*, *358*, *359*, *360*, *361*, *362*, *363*, *364*, *365*, *366*, *367*, *368*, *369*, *370*, *371*, *372*, *373*, *374*, *375*, *376*, *377*, *378*, *379*, *380*, *381*, *382*, *383*, *384*, *385*, *386*, *387*, *388*, *389*, *390*, *391*, *392*, *393*, *394*, *395*, *396*, *397*, *398*, *399*, *400*, *401*, *402*, *403*, *404*, *405*, *406*, *407*, *408*, *409*, *410*, *411*, *412*, *413*, *414*, *415*, *416*, *417*, *418*, *419*, *420*, *421*, *422*, *423*, *424*, *425*, *426*, *427*, *428*, *429*, *430*, *431*, *432*, *433*, *434*, *435*, *436*, *437*, *438*, *439*, *440*, *441*, *442*, *443*, *444*, *445*, *446*, *447*, *448*, *449*, *450*, *451*, *452*, *453*, *454*, *455*, *456*, *457*, *458*, *459*, *460*, *461*, *462*, *463*, *464*, *465*, *466*, *467*, *468*, *469*, *470*, *471*, *472*, *473*, *474*, *475*, *476*, *477*, *478*, *479*, *480*, *481*, *482*, *483*, *484*, *485*, *486*, *487*, *488*, *489*, *490*, *491*, *492*, *493*, *494*, *495*, *496*, *497*, *498*, *499*, *500*, *501*, *502*, *503*, *504*, *505*, *506*, *507*, *508*, *509*, *510*, *511*, *512*, *513*, *514*, *515*, *516*, *517*, *518*, *519*, *520*, *521*, *522*, *523*, *524*, *525*, *526*, *527*, *528*, *529*, *530*, *531*, *532*, *533*, *534*, *535*, *536*, *537*, *538*, *539*, *540*, *541*, *542*, *543*, *544*, *545*, *546*, *547*, *548*, *549*, *550*, *551*, *552*, *553*, *554*, *555*, *556*, *557*, *558*, *559*, *560*, *561*, *562*, *563*, *564*, *565*, *566*, *567*, *568*, *569*, *570*, *571*, *572*, *573*, *574*, *575*, *576*, *577*, *578*, *579*, *580*, *581*, *582*, *583*, *584*, *585*, *586*, *587*, *588*, *589*, *590*, *591*, *592*, *593*, *594*, *595*, *596*, *597*, *598*, *599*, *600*, *601*, *602*, *603*, *604*, *605*, *606*, *607*, *608*, *609*, *610*, *611*, *612*, *613*, *614*, *615*, *616*, *617*, *618*, *619*, *620*, *621*, *622*, *623*, *624*, *625*, *626*, *627*, *628*, *629*, *630*, *631*, *632*, *633*, *634*, *635*, *636*, *637*, *638*, *639*, *640*, *641*, *642*, *643*, *644*, *645*, *646*, *647*, *648*, *649*, *650*, *651*, *652*, *653*, *654*, *655*, *656*, *657*, *658*, *659*, *660*, *661*, *662*, *663*, *664*, *665*, *666*, *667*, *668*, *669*, *670*, *671*, *672*, *673*, *674*, *675*, *676*, *677*, *678*, *679*, *680*, *681*, *682*, *683*, *684*, *685*, *686*, *687*, *688*, *689*, *690*, *691*, *692*, *693*, *694*, *695*, *696*, *697*, *698*, *699*, *700*, *701*, *702*, *703*, *704*, *705*, *706*, *707*, *708*, *709*, *710*, *711*, *712*, *713*, *714*, *715*, *716*, *717*, *718*, *719*, *720*, *721*, *722*, *723*, *724*, *725*, *726*, *727*, *728*, *729*, *730*, *731*, *732*, *733*, *734*, *735*, *736*, *737*, *738*, *739*, *740*, *741*, *742*, *743*, *744*, *745*, *746*, *747*, *748*, *749*, *750*, *751*, *752*, *753*, *754*, *755*, *756*, *757*, *758*, *759*, *760*, *761*, *762*, *763*, *764*, *765*, *766*, *767*, *768*, *769*, *770*, *771*, *772*, *773*, *774*, *775*, *776*, *777*, *778*, *779*, *780*, *781*, *782*, *783*, *784*, *785*, *786*, *787*, *788*, *789*, *790*, *791*, *792*, *793*, *794*, *795*, *796*, *797*, *798*, *799*, *800*, *801*, *802*, *803*, *804*, *805*, *806*, *807*, *808*, *809*, *810*, *811*, *812*, *813*, *814*, *815*, *816*, *817*, *818*, *819*, *820*, *821*, *822*, *823*, *824*, *825*, *826*, *827*, *828*, *829*, *830*, *831*, *832*, *833*, *834*, *835*, *836*, *837*, *838*, *839*, *840*, *841*, *842*, *843*, *844*, *845*, *846*, *847*, *848*, *849*, *850*, *851*, *852*, *853*, *854*, *855*, *856*, *857*, *858*, *859*, *860*, *861*, *862*, *863*, *864*, *865*, *866*, *867*, *868*, *869*, *870*, *871*, *872*, *873*, *874*, *875*, *876*, *877*, *878*, *879*, *880*, *881*, *882*, *883*, *884*, *885*, *886*, *887*, *888*, *889*, *890*, *891*, *892*, *893*, *894*, *895*, *896*, *897*, *898*, *899*, *900*, *901*, *902*, *903*, *904*, *905*, *906*, *907*, *908*, *909*, *910*, *911*, *912*, *913*, *914*, *915*, *916*, *917*, *918*, *919*, *920*, *921*, *922*, *923*, *924*, *925*, *926*, *927*, *928*, *929*, *930*, *931*, *932*, *933*, *934*, *935*, *936*, *937*, *938*, *939*, *940*, *941*, *942*, *943*, *944*, *945*, *946*, *947*, *948*, *949*, *950*, *951*, *952*, *953*, *954*, *955*, *956*, *957*, *958*, *959*, *960*, *961*, *962*, *963*, *964*, *965*, *966*, *967*, *968*, *969*, *970*, *971*, *972*, *973*, *974*, *975*, *976*, *977*, *978*, *979*, *980*, *981*, *982*, *983*, *984*, *985*, *986*, *987*, *988*, *989*, *990*, *991*, *992*, *993*, *994*, *995*, *996*, *997*, *998*, *999*, *1000*.

JESSEL, M.R., held that *Culley v. Buttifant* (1) did not apply, as the Defendant *Greenhill* had not appeared, and he ordered that the cause should proceed under the new practice, and the bill should be treated for all purposes as if the same were the Plaintiffs' statement of claim, so that the Plaintiffs might proceed under Rules of Court, 1875, Order XIII., rule 9, and Order XXIX., rule 10.

M. R.

1876

PROVIDENT
PERMANENT
BUILDING
SOCIETY
v.
GREENHILL.

Solicitors for Plaintiffs : *Sharpe, Parkers, & Co.*
Solicitors for Defendants : *Prior, Bigg, & Co.*, agents for *Capron & Sparkes, Guildford.*

(1) *Ante*, p. 84.

V. C. M.

TOMKINS v. COLTHURST.

1875

[1868 T. 130.]

Dec. 15.

Administration—Costs—Deficient Estate—Residuary Devise—Pecuniary Legatee.

3 Ch. D. 110

The decision of the Court of Appeal in *Lancefield v. Iggulden* (1) affirms *Hensman v. Fryer* (2) only on the first point decided by it, and it is therefore still the rule in administering assets that when the residuary personal estate is insufficient to pay the costs of a suit, the deficiency must be made up by the pecuniary legatees in priority to the residuary devisees.

THIS was a suit instituted by an infant interested under a gift of a blended residuary fund of real and personal estate given by the will of *Robert Jolliffe Colthurst*, which was dated the 25th of June, 1862. The testator also gave certain pecuniary legacies, which were increased by a codicil, and an annuity of £200 a year to his widow, charged on the residuary fund.

In consequence of a finding by the certificate of the Chief Clerk under the decree, that the personal estate received by the executors was insufficient to pay the funeral and testamentary expenses, debts, and pecuniary legacies by the sum of £1341 16s 5d., and that they had recouped themselves the difference by the sale of a portion of the real estate of the testator not specifically devised, an inquiry was directed at the first hearing on further consideration on the 25th of July, 1870, what sum ought to be raised out of the testator's personal estate not specifically bequeathed.

The Chief Clerk found, in answer to this inquiry, that the personal estate of the testator not specifically bequeathed was insufficient to pay his funeral and testamentary expenses and debts to the extent of £2303 12s. 3d.

In consequence of this insufficiency he did not proceed further in the inquiry, but stated that the Defendants, the executors, who were also pecuniary legatees, submitted to the judgment of the Court that the pecuniary legacies, the specific bequests, and the residuary real estate ought to have contributed rateably to the payment of the testator's debts, funeral expenses, and costs.

(1) Law Rep. 10 Ch. 136.

(2) Law Rep. 3 Ch. 420.

Followed in Fryer v. Hensman 3 Ch. D. 110

The cause now coming on for second further consideration, this point was argued.

Glasse, Q.C., and *W. W. Karlake*, for the Plaintiff:—

The question sought to be raised is, whether *Hensman v. Fryer* (1) can still be regarded as an authority on the second point supposed to have been decided by it. On this point the decision has always been treated as a mistaken one: *Dugdale v. Dugdale* (2); *Collins v. Lewis* (3); notwithstanding that on the first point it has always been followed and treated as a binding decision: *Gibbins v. Eyden* (4). *Lancefield v. Iggulden* (5) supports it on this point only. In that case the Court below had treated *Hensman v. Fryer* as not being an authority on either point, and the remarks in the judgment on the appeal are directed against that view.

J. Pearson, Q.C., and *Ferrers*, for the Defendants:—

The question is, whether the remarks of the Lord Chancellor and Lords Justices in *Lancefield v. Iggulden* can be ignored altogether. Their Lordships, having before them the fact that two points were determined in that case, speak of it as a most carefully considered judgment, a distinct expression of opinion by the Judge who was then at the head of the Court, and as being binding upon the other branches of the Court. The decision really did no more than extend the principle on which *Tombs v. Roch* (6) was decided. In any other view the effect of the *Wills Act* would be to give a residuary devisee a much greater benefit than he would have had under a will before the Act.

MALINS, V.C.:—

The point in this case is a very important one, namely, whether there is a liability between pecuniary legatees, specific legatees, and specific devisees to contribute rateably to make up a deficiency of the personal estate not specifically devised to meet the debts and funeral and testamentary expenses of a testator. I am

(1) Law Rep. 3 Ch. 420.

(2) Ibid. 14 Eq. 234.

(3) Ibid. 8 Eq. 798.

(4) Law Rep. 7 Eq. 371.

(5) Ibid. 10 Ch. 136.

(6) 2 Coll. 490.

V.-C. M.

1875

TOMKINS
v.
COLTHURST.

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 COLTHURST.
 —

very much disposed to acquiesce in the view that it would be more equitable that such a rule should prevail. All the persons who take in these different capacities may be presumed to be equally objects of a testator's bounty, and all should therefore contribute rateably to the payment of his debts. But I believe that no one denies that it has been the rule of the Court of Chancery that pecuniary legacies are, in case of deficiency of the general personal estate, the primary fund for payment of the debts and funeral and testamentary expenses, and that there is no right to marshal for the purpose of equalising the liability. This rule is well established, though perhaps it would have been better if it had been settled the other way.

In this state of things the point came before Lord *Chelmsford*, when Lord Chancellor, in *Hensman v. Fryer* (1), a case in which there were two points to be determined. The first was whether, as regarded real estate, a will spoke from the death of the testator, and put the residuary devisee in the same position as a specific devisee. I had to consider that point in *Gibbins v. Eyden* (2), and I entirely adhere to the view I took in that case, that it was concluded by *Hensman v. Fryer*, which I treated as a binding authority. But the other point decided in *Hensman v. Fryer* was a reversal of the settled rule of the Court. I do not think that point attracted as much attention as the other. But as early as the year 1869, in *Collins v. Lewis* (3), the same point came before Sir *John Stuart*, who, as Vice-Chancellor, had greater experience of the mode of administering estates in Chancery than Lord *Chelmsford*. The Chancery Bar, as well as the Judges and other persons familiar with the practice of that Court, knew the rule perfectly well; and if Lord *Chelmsford* had been as firmly impressed with that view, he would not, I think, have come to the conclusion to which he did come. Sir *John Stuart* said in that case (4): "Upon principle, as well as upon authority, it is the settled law of the Court that the personal estate not specifically bequeathed must be first applied in payment of debts before the real estate, which passes under a residuary devise, can be resorted to." Nobody would have doubted the accuracy of that statement.

(1) Law Rep. 3 Ch. 420.

(2) Ibid. 7 Eq. 371.

(3) Law Rep. 8 Eq. 708.

(4) Ibid. 709.

Ch.D. III

That was in 1869, and nothing else occurred till *Dugdale v. Dugdale* (1). The facts in that case were, that a testator gave a pecuniary legacy, and then devised his real estates to another person, not charging them with his debts. In the judgment, after referring to *Hensman v. Fryer* (2), I said: "The Court is not bound to follow a decision even of the Court of Appeal if clearly erroneous." I referred, in support of that view, to *Drummond v. Drummond* (3). That was a case which I had myself argued when at the Bar before Lord *Chelmsford* and the Lords Justices *Turner* and *Knight Bruce*, and, though I did all I could to induce them to follow a previous decision of Lord *Westbury*, which has been generally considered to be erroneous, I was unsuccessful. I am, therefore, not able to conclude that I can follow *Hensman v. Fryer*, if I am as much at liberty on the point as I was when I decided *Dugdale v. Dugdale*.

Mr. *Pearson* says that I have not so much liberty to do so, because *Lancefield v. Iggulden* (4) has decided that *Hensman v. Fryer* (5) is a binding decision on both the points which arose in it. But it was, in fact, an appeal from a decision of Vice-Chancellor *Bacon*, that a residuary devise was not specific. There is a mistake in the report in stating, in the judgment of the Lord Chancellor (6); that Vice-Chancellor *Hall* had followed Vice-Chancellor *Kindersley*. It was my decision which was there referred to. But the point in *Hensman v. Fryer* as to a residuary devise being specific was the only one referred to in *Lancefield v. Iggulden*. The other point does not seem to have been even mentioned; and I cannot think that the learned Judges, by expressions in that case which directly refer only to points which did arise, intended to adopt a rule which would reverse the old and well-settled practice of the Court of Chancery on an entirely distinct point.

I must, therefore, continue to follow the old rule as to the marshalling of assets.

Solicitors: *Moon; Prideaux & Son.*

(1) Law Rep. 14 Eq. 234.

(4) Law Rep. 10 Ch. 136.

(2) Ibid. 235.

(5) Ibid. 3 Ch. 420.

(3) Ibid. 2 Eq. 335.

(6) Ibid. 10 Ch. 141.

V.-C. M.

1875

TOMKINS

v.
COLTHURST.

3rd D. III

V.-C. M.

1876

Jan. 22.

HOPEWELL v. BARNES.

[1874 H. 44.]

*Practice—Judicature Acts—Rules of Court, 1875, Order XLVI., r. 1—
Stop Order.*

It is no longer necessary, as a preliminary to obtaining a stop order on a fund standing in Court to the credit of the Chancery Division of the High Court of Justice, by a person who has a judgment in an action in another Division of the High Court, that he should obtain a charging order in that Division.

THERE was a fund in Court standing to the credit of this cause, which was one pending when the Judicature Acts came into force.

A person interested in this fund was a Defendant to an action in the Common Pleas in which judgment had been recovered against him.

The Plaintiff in the action had obtained in the Chambers of the Vice-Chancellor a stop order on the fund in Court. But the Registrar hesitated as to drawing up the stop order, on the ground that the preliminary step of obtaining a charging order in the Common Pleas had not been taken previously to the application for the stop order.

Crossley now applied that the order made in Chambers might be drawn up.

He contended that requirement of a preliminary charging order arose from the decisions in *Miles v. Presland* (1) and *Hulkes v. Day* (2), in which it had been held that a Judge of the Court of Chancery was not a Judge of one of the Superior Courts at *Westminster* within the meaning of the 14th section of 1 & 2 Vict. c. 110. Under Order XLVI., rule 1, of the Rules of Court, 1875, the necessity for the preliminary order had ceased.

MALINS, V.C. :—

The Judicature Acts seem to have rendered the preliminary order unnecessary, and I will direct the stop order to be passed.

Solicitor : *Joseph E. Turner.*

(1) 4 My. & Cr. 431.

(2) 10 Sim. 41.

*After the new law the Div for Chancery
can not make a stop order.*

In re PAVY'S PATENT FELTED FABRIC COMPANY.

V.-C. M.

Winding-up—Acceptance of Bills—Agent—Lien upon Goods.

1876

Jan. 27.

A company employed an agent for the sale of goods in a shop taken for that purpose. The agent was to be paid a commission on the sale, and he was to accept bills for the company for such a reasonable amount as was represented by the goods on his premises; and if on the bills arriving at maturity the agent had not sufficient funds in his hands to meet the bills, the company were to make good the difference.

The company failed and was wound up, and at that time a bill accepted by the agent had not arrived at maturity:—

Held, that the agent had a lien upon the goods in his hands for the amount of the bill.

THIS was a motion on behalf of *Henry Welsford*, one of the agents of the *Pavy's Patent Felted Fabric Company*, that the sum of £200 might be provided out of the assets of the company for the purpose of taking up a bill of exchange, dated the 11th of August, 1875, drawn by the company and accepted by *Welsford*, payable on the 14th of December, 1875.

Mr. *Welsford* was appointed an agent of the company in June, 1874, when a shop was taken by him in the *High Street, Exeter*, for the sale of the company's goods; and it was agreed between *Welsford* and the company that the rent of the shop should be paid by the company, not to exceed £90 per annum; that *Welsford* should receive 25 per cent. commission on all goods sold by him with credit, and 30 per cent. on all cash sales; and one of the terms upon which Mr. *Welsford* was appointed an agent of the company was that the company should be at liberty to draw bills of exchange upon him from time to time, for such a reasonable amount as was represented by the goods in his premises, and that should he not have sufficient funds in hand to meet the bills when due, the company undertook to remit the amount to make up any such deficiency. In pursuance of this arrangement, the before-mentioned bill of exchange for £200 was drawn by the company upon *Welsford*, and accepted by him on the 11th of August, payable on the 14th of December, 1875. A petition to wind up the company was presented on the 25th of August, and the winding-up order was made on the 5th of November.

V.-C. M.

1876

In re
PAVY'S
PATENT
FELTED
FABRIC
COMPANY.

On the 6th and the 13th of September, 1875, Mr. *Welsford* wrote to Mr. *J. Copestick*, the deputy-manager of the company, and Mr. *Griffiths*, the secretary of the company, inquiring as to what provision the company would make for payment of the bill then accruing, and also for the rent coming due at Michaelmas, 1875.

In reply to these letters, Mr. *F. Maynard*, who had been appointed the official liquidator in the winding-up of the company, wrote to Mr. *Welsford* on the 14th of September, on behalf of himself and his co-liquidator, to the following effect:—"The company is in liquidation, and we are sorry we are unable to pay the accounts, or make any provision for the bill to which you allude. If you have become liable for them, as it appears to us that you have, we recommend you to pay them, so as to avoid unpleasantness. With regard to the goods you have on hand, we authorize you to sell them to the best advantage you can, leaving it to be decided by the Court whether or not you will be entitled to appropriate the proceeds to recoup yourself, or whether that will form part of the general assets of the company."

Upon receiving several other accounts due by the company, Mr. *Welsford* again wrote to the liquidators for information as to how he should proceed, and having received no answer, he subsequently advertised for sale by auction the whole of the goods belonging to the company, and the sale took place on the 22nd of September. In the meantime an application was made by the official liquidator to Vice-Chancellor *Bacon*, the vacation Judge, for an injunction to restrain the sale; and an order to that effect having been made, a telegram was sent to the auctioneer to stop the sale, which was then proceeding. The sale was consequently stopped, after goods to the value of £128 9s. 6d. had been sold.

The remaining goods were then taken possession of by the liquidators, and were subsequently sold by them, by private contract, for the sum of £125, and were re-sold by the purchaser, by auction, for £240.

Glasse, Q.C., and *Begg*, for *Welsford* :—

This question arises in the winding-up of the company. *Welsford* was their agent for the sale of goods upon commission, and it

was arranged that he should accept bills for the company, but it was distinctly stated that the bills should not exceed the amount of goods in his possession; and if the amount of proceeds should not be sufficient to meet the bills, the company were to supply him with the necessary funds to cover the acceptances. This understanding amounted to a lien upon the goods in the hands of *Welsford*, and he is now entitled to be paid out of the proceeds derived from the sale of the goods.

V.-C. M.

1876

In re
PAVY'S
PATENT
FELTED
FABRIC
COMPANY.

Higgins, Q.C., and *W. Barber*, for the official liquidator:—

There was no contract or agreement by the company with *Welsford* which could entitle him to any specific lien upon the goods. He was only an agent for the sale of goods, and on the credit of his agency he was induced to accept bills. This cannot be construed into a payment for the goods. The utmost it could amount to would be a mortgage of the goods to the agent, and in that case the mortgage would be void for want of registration. The *Companies Act* of 1862 (25 & 26 Vict. c. 89) enacts, by the 43rd section, that every company shall keep a register of all mortgages and charges affecting their property, and an omission to make such registry subjects the directors to a fine of £50. This enactment is a protection to the creditors, for otherwise, by a secret arrangement with their agents, companies might charge all their property, and thus defraud their creditors. The decision in *In re Wynn Hall Coal Company* (1) was to this effect; and the case of *In re General Provident Insurance Company* (2) is a distinct authority for the proposition that where the goods of a company are mortgaged the terms of the Act must be strictly complied with. This was a charge which, being unregistered, could not be set up against the creditors of the company. The goods in the hands of the agent, in fact, represented the called-up capital of the company.

MALINS, V.C.:—

A very important point of law is raised in this case, but I have no doubt whatever as to how it should be decided.

(1) Law Rep. 10 Eq. 515.

(2) 17 W. R. 514.

V.-C. M.

1876

*In re*PAVY'S
PATENT
FELTED
FABRIC
COMPANY.

This company was formed for the production of felted articles, and they agreed to appoint Mr. *Welsford* their agent at *Exeter* for the sale of articles manufactured by the company. The agency was settled upon this basis: that *Welsford* was to open a shop in the *High Street*, the rent of which, not exceeding £90, was to be paid by the company. Upon all goods sold for cash he was to receive a commission of £30 per cent., and upon goods sold for credit he was to have 25 per cent.

Welsford was also induced to accept bills for the company from time to time for such a reasonable amount as was represented by the goods in his hands; and it was distinctly stated that should he not have sufficient funds in hand to meet the bills when due, the company would remit the amount to make up any such deficiency.

In this state of things Mr. *Welsford*, on the 11th of August, accepted a bill drawn upon him by the company for £200, which would become due on the 14th of December; but before the bill arrived at maturity the company came to be wound up under an order dated the 5th of November. The bill, then, having arrived at maturity, the question arises whether *Welsford* is entitled to be paid the amount of the bill out of the proceeds of the sale of the goods of the company in the possession of *Welsford*, or whether he is to stand as a general creditor of the company, and so come in under the winding-up and receive an equal dividend with the rest of the creditors. I think it clear that he is entitled to be paid out of the goods in his possession.

When a man receives goods from an ordinary tradesman, and gives a cheque in payment for them, then, as soon as the cheque is paid, the goods are paid for; but if, by arrangement, he gives a promissory note in payment for the goods instead of a cheque, still the transaction is in the same position, and as soon as the promissory note is honoured the goods are paid for; consequently, when the bill was honoured the goods were paid for. Could it be contended that the company, after this, could have gone to the house and taken out of *Welsford's* possession the goods he had paid for? He would have said, "I have goods of yours in my possession, and you cannot take them away without paying me the amount of the bill which I have accepted." If they had persisted, he might

have come to this Court, and would certainly have been entitled to an injunction to restrain the company from removing the goods. The result is, then, that he has paid for the goods, and no doctrine of agent and principal could prevent him from being entitled to retain the goods; and though the company do not actually say you shall have a lien upon the goods, it was implied by the nature of the transaction.

Then it is said that this was a mortgage under the 43rd section of the *Companies Act* of 1862 (25 & 26 Vict. c. 89), and that as such mortgage it is not registered, and therefore cannot be made available; and it is argued that it would be a dangerous thing to allow such a charge as this to have effect, because in the case of any company they might, by drawing bills upon their agents all round the country who are in possession of goods of the company, deprive the creditors of the company of the property upon which they would otherwise have a claim. I can only say it would be perfectly right for such agents to retain the goods in their possession if they had paid for them as Mr. *Welsford* has. He was, therefore, entitled to be paid the amount of the acceptance out of the moneys derived from the sale of the goods, and assuming that he was not in funds arising from the sale sufficient to meet the bill, then he was entitled to retain so much of the goods as would cover the acceptance, which was, in fact, payment by him for the goods, and the goods could not be taken out of his possession without repayment being made.

Then it appears that the company having stopped payment on the 18th of August, *Welsford* finds himself in possession of these goods. He is their agent, and he is told that the company have made up their minds to discontinue business. Mr. *Maynard* is appointed the official liquidator, and it was of course desirable that the goods should be turned into money. Mr. *Welsford* was naturally anxious about the payment of the bill to become due on the 14th of December, and he wrote to Mr. *Maynard* making inquiries as to what would be done. He received an answer from Mr. *Maynard*, in which he says: "If you have become liable for them (that is the debts incurred by *Welsford*), as it appears to us that you have, we recommend you to pay them, so as to avoid unpleasantness. With regard to the goods you have on hand, we

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authorize you to sell them to the best advantage you can, leaving it to be decided by the Court whether or not you will be entitled to appropriate the proceeds to recoup yourself, or whether that will form part of the general assets of the company."

In consequence of this letter, Mr. *Welsford* comes to the conclusion that it would be more advantageous to sell the goods by auction, and took steps for carrying that out, when Mr. *Maynard* goes to the vacation Judge and stops the auction after a portion of the goods had been sold.

In my opinion this injunction ought never to have been applied for; it was altogether a ridiculous proceeding; and I cannot think that if Mr. *Maynard's* letter had been brought to the attention of the Judge the injunction would ever have been granted. As it is, I am of opinion that the official liquidator must pay the whole of the costs, and get them over and his own costs in the liquidation; and as to what is due to Mr. *Welsford*, that must be decided by sending the matter to Chambers that an account may be taken, and Mr. *Welsford* must be paid the remainder of what is due to him out of the proceeds of the sale of the goods.

Solicitors for *Welsford*: *J. Elliott Fox & Co.*

Solicitors for Official Liquidator: *Mercer & Mercer.*

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TAYLOR v. COENEN.

[1873 T. 124.]

Voluntary Settlements—Insolvency of Settlor—Debts in excess of Assets—Fraud upon Creditors.

A trader, doing business to the amount of £100,000 per annum, executed two voluntary settlements in favour of his wife, the first being two years and the second one year before his death. By the first he settled two policies of assurance, each for £1000; by the second he settled his furniture, worth about £1000. An inquiry into the state of his affairs having been directed, it was found that at the date of the first settlement his debts would have exceeded his assets by £1293, and at the date of his second settlement his debts were £10,726 over his assets. A bill was filed by a creditor, whose debt was contracted after the first but before the second settlement, to set

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aside both deeds. No debt was proved to exist which had been contracted at the date of the first settlement:—

Held, that as the settlor's debts exceeded his assets when both deeds were executed, he was then insolvent, and the deeds must be declared fraudulent and void as against the Plaintiff and his other creditors.

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THIS bill was filed for the administration of the estate of *Richard Coenen*, who died on the 28th of September, 1873, and for a declaration that two several deeds, dated the 24th of January, 1872, and the 15th of January, 1873, might be declared void as against the Plaintiff and the other creditors of *Richard Coenen*, on the ground that they were voluntary deeds, executed by *Richard Coenen* when he was in insolvent circumstances.

Richard Coenen made his will on the 18th of January, 1872, and thereby gave his wife, the Defendant *Sarah Coenen*, all his real and personal estate for her own use and benefit, and appointed her and the Defendant *John Werner* his executors.

The testator had no real estate in *England*, and his personal estate was insufficient for the payment of his debts, even if that comprised in the following two indentures formed part thereof.

By an indenture dated the 24th of January, 1872, the testator, in consideration of natural love and affection for his wife *Sarah Coenen*, assigned unto *John Werner* and *Charles Smith* two policies of assurance, each for the sum of £1000, on his own life, to hold the same in trust upon his death to receive the moneys payable under the policies and pay the same to his wife for her own use absolutely in case she should be living at his death.

By an indenture dated the 15th of January, 1873, *Richard Coenen* assigned to the said *J. Werner* and *C. Smith* his household furniture and effects in and upon his private residence upon trust for *Sarah Coenen* during her life, in case she should survive him, and after her death to dispose of the same and hold the proceeds for the benefit of his children, and if no children, then according to the trusts of his will.

Richard Coenen never had a child. At the date of the two before-mentioned indentures he was engaged in business as a silk merchant, in the course of which he had contracted large liabilities, and he contemplated the continuance of his business, which was said to amount to £100,000 per annum.

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The Plaintiff was a creditor for £660 in respect of a debt contracted before the date of the last-mentioned indenture, but after the first indenture. The testator was also indebted to various other persons in large amounts, but there was no proof that any of the debts were contracted before the date of the first-mentioned indenture.

The Plaintiff insisted that, under the circumstances, the property comprised in the above two indentures could not properly be settled by *R. Coenen*, and that the settlement thereof was an attempt to defeat his creditors, and that they ought to be set aside, and the property comprised therein treated as assets of *R. Coenen* for payment of his debts.

The bill prayed administration of the estate of *R. Coenen*, and a declaration that the two indentures of the 24th of January, 1872, and the 15th of January, 1873, were void as against the Plaintiff and the other creditors of *R. Coenen*, and that the same might be set aside and the property comprised therein respectively might be treated and made available as assets of *R. Coenen* for payment of his debts.

An inquiry having been directed as to the state of the testator's debts and assets at the date of each of the indentures of assignment before-mentioned a valuation had been made, and from such valuation it appeared that on the 24th of January, 1872, the date of the first indenture, the testator's debts and liabilities amounted to £123,590 13s. 6d., and that there was a deficiency of assets to meet this sum to the amount of £1293 7s. 1d., and also that on the 15th of January, 1873, the date of the second indenture, the debts and liabilities amounted to £104,108 9s. 2d., and there was a deficiency of assets to the amount of £10,726 8s. 9d.

Glasse, Q.C., and Kekewich, for the Plaintiff:—

At the time these voluntary settlements were executed the testator was in trade; and it is shewn by the accounts which have been taken in the cause that at the date of the first settlement his debts exceeded his assets by £1293, and on the occasion of the second settlement these liabilities had increased to £10,726; consequently, as he was indebted in a larger sum than he could pay, he must be considered as having been insolvent, and the

voluntary settlements must be set aside for the benefit of the creditors.

This principle was settled in *Mackay v. Douglas* (1) and *Crossley v. Elworthy* (2).

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J. Pearson, Q.C., and Maidlow, for the Defendants:—

The creditor who sues to set aside a voluntary settlement must shew that his debt was owing at the date of the settlement, and the Plaintiff's debt was not contracted till after the first settlement, consequently his contention cannot prevail so far as that settlement is concerned. There is no creditor before the Court who is shewn to have been so before the first deed was executed: *Lush v. Wilkinson* (3); *Martyn v. M'Namara* (4); *Townsend v. Westcott* (5); *Spiritt v. Willows* (6). Moreover, the case comes within the exception stated by your Lordship in *Crossley v. Elworthy*, where a man is perfectly solvent one year and insolvent the next. Then Vice-Chancellor *Kindersley*, in *Jenkyn v. Vaughan* (7), said: "The instrument must be made with the intent to defraud creditors." In this case it was not the bulk of his property that the testator was settling, as it was in *Mackay v. Douglas*, but a mere trifling portion of his property, one policy being worth at the utmost £129 when the settlement was made, and the other a recent policy effected in the year 1869. At any rate, it is quite evident that there could have been no intention to delay or defraud the creditors, which is the criterion upon which the Court must act in deciding whether a settlement comes within the statute of *Elizabeth*, which was intended to provide against fraud.

MALINS, V.C. :—

This is a suit for the administration of the estate of *Richard Coenen*, who died in September, 1873. The testator was a silk merchant in a considerable way of business. He had insured his life, and being desirous of making a provision for his wife, he assigned the policies for her benefit, and he subsequently made another

(1) Law Rep. 14 Eq. 106.

(2) Ibid. 12 Eq. 158.

(3) 5 Ves. 384.

(4) 4 D. & War. 411.

(5) 2 Beav. 340.

(6) 3 D. J. & S. 293.

(7) 3 Drew. 419.

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assignment of his furniture for the same object. As the testator was a trader and died insolvent, it became important to ascertain whether these assignments were valid as against his creditors. The first was made within two years and the second within one year of his death; therefore if it could be shewn that he was insolvent at the time he executed the deeds, it would follow that they must be declared void against his creditors. Inquiries were directed as to the state of his affairs at both those periods, that is, in January, 1872, and January, 1873, and the result of the inquiries shews that when he made the first settlement he was indebted to the extent of £1293; that is to say, if his affairs had then been wound up, he would not have had sufficient assets to cover his liabilities to the extent of that sum; consequently he would have been insolvent to the extent of £1293. His affairs became worse after that period, and it appears that upon the occasion of making the second settlement there was a deficiency to the amount of £10,726. Under such circumstances, the question is whether these deeds can stand against the creditors? It has been argued for the Defendant that, looking at all the facts, the testator could not be considered insolvent; first, because he was not indebted to any large amount considering the extent of his business, and many of the bills outstanding at the time had not arrived at maturity, and could not be fairly included in his debts; and I am asked to conjecture that the stock, being of a fluctuating value, might have been of more value at the death of the testator than when the settlements were executed; but I might just as well conjecture that the stock was of less value, and this would be the more probable conjecture of the two, considering that it had fallen considerably between the date of the first and the second deed. The fact is, I must take the valuation made by a competent valuer, both as regards the stock and the bills, as the sole basis for my knowledge of the testator's affairs. It is further argued that a voluntary settlement cannot be set aside unless some debts are due which existed at the time of the deed being executed. From that proposition I entirely dissent, and I have the authority of the two cases of *Martyn v. M'Namara* (1) and *Crossley v. Elworthy* (2) that in order to decide whether a settle-

(1) 4 D. & War. 411.

(2) Law Rep. 12 Eq. 158.

ment is valid or not, I must ascertain whether the settlor was at the time in a position to make a settlement; and if it is proved that he was insolvent at the time, to whomsoever he owed the money, he was not in a position to make a settlement. Then I also go upon the authority of *Townsend v. Westacott* (1), where even the proof of actual solvency at the time of making the settlement was held not to protect it if made in contemplation of insolvency, or where the settlor is largely indebted and subsequently becomes insolvent. If a man is solvent, then he has property which he can dispose of, but only to the extent of his solvency; he cannot give away the property which belongs to his creditors. The principle is carried further by Lord Justice *Giffard* in *Freeman v. Pope* (2), where he says: "If after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent;" and, "if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them." The true criterion therefore is, whether he was in a position to make a voluntary settlement or not; and the Court cannot say that he was so if at the time of making it he was unable to pay all his creditors. He may not have been indebted to a large amount, but if he owed more than he could pay, that is sufficient to come within the principle. Then it is said that the settlement was of a very trifling amount, considering the extent of his business; that he had only paid premiums to a small amount, and that he could only have defrauded his creditors to the amount of those premiums. There is certainly a semblance of truth in that contention, but the answer to it is that the creditors have a right to all the property which would have belonged to him, and a considerable amount of property has been produced by these policies. In the state of his affairs he was not at liberty to reduce the amount of his property by the payment of the premiums, but as by paying the premiums he has kept on foot the policies, the creditors are entitled to have that property which resulted from such payment. It is true that if he had supposed the produce of the policies would go to his creditors

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(1) 2 Beav. 340.

(2) Law Rep. 5 Ch. 538, 545.

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he would very likely have allowed them to drop, and it was only for the sake of his wife and family that he paid the premiums. This view of the case may well be taken into consideration by the creditors themselves when they see the position to which the testator's widow is reduced ; but all I can do is to carry out the law, by which I am bound to declare that the settlements are void as against the creditors, and all the property realized upon them must go to the creditors. I may add that I have no doubt whatever in my mind as to the principles upon which I decide this case, and it is important for the public to know that a man cannot make a voluntary settlement at a time when he is insolvent.

The decree will therefore be, that the indentures of the 24th of January, 1872, and the 15th of January, 1873, are fraudulent and void as against the Plaintiff and the other creditors of *Richard Coenen*, the testator in the cause, and that the policies, furniture, and premises comprised in such indentures respectively are assets for the payment of the testator's debts. Tax as between solicitor and client the costs of the Plaintiff and also of the Defendant *Sarah Coenen* of this suit, including in the costs of *Sarah Coenen* any costs, charges, and expenses properly incurred by her as executrix of the testator. Tax the costs of the Defendants *J. Werner* and *Charles Smith* of this suit, if any, as between party and party, and let the Plaintiff's and Defendants' costs be paid out of the fund paid into Court to the credit of the cause.

Solicitors for the Plaintiff: *Walters & Gush.*

Solicitor for the Defendants: *C. Smith.*

RUMSEY v. READE.

[1875 R. 111.]

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Practice—Rules of Court, 1875, Order XL., r. 11—Order on Motion for Account and Delivery of Securities.

Order on motion by Plaintiffs on notice, for an account and delivery of securities relating to the testator's estate, of which they were trustees, admitted by the Defendant in his answer to be in his possession as agent for the Plaintiffs.

E. B. COPE, on behalf of the Plaintiffs, the trustees of the will of *William Duell*, moved under Order XL., rule 11, on notice, that an account might be taken of all sums received by the Defendant for or on account of the estate of *William Duell*, deceased, and of the application thereof respectively, and of all profits (if any) made by the Defendant with the trust funds; and also an account of the present state of the investments of such trust funds, and of all dividends, interest, and income arising from such investments, which had accrued or been received by the Defendant; and that the Defendant might deliver up to the Plaintiffs all moneys, deeds, documents, writings, and securities for money, belonging to the estate of *William Duell*, deceased.

The bill, which was filed on the 21st of August, 1875, by the trustees of the will of *William Duell* against the Defendant, their agent, for the purpose of carrying out the trusts of the will, prayed an account of all moneys received by the Defendant on account of the estate of *William Duell*, payment of the amount found due on taking such account, and delivery up by the Defendant of all securities, &c., in his possession relating to the estate.

The Defendant had put in his answer on the 16th of November, 1875, admitting that he was the Plaintiffs' agent for the purpose of carrying out the trusts of the testator's will, that he was liable to account, and that certain deeds and securities belonging to the estate were in his possession, which he had promised, and was ready and willing, to send to the Plaintiffs.

The VICE-CHANCELLOR made the order in terms of the notice of motion, subject to production of an affidavit of service.

Solicitors: *Cope & Co.*

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LAKER v. HORDERN.

[1875 L. 51.]

Will—Bequest after Death of Widow to “all my Daughters” who shall attain Twenty-one or marry—Death of Testator, leaving infant illegitimate Daughters only—Designation held sufficient.

Testator bequeathed residuary personal estate, after the death of his wife, to “all and every my daughters, in equal shares, who shall attain the age of twenty-one years, or marry.”

At his death he had no legitimate child :—

Held, that evidence as to the surrounding circumstances was admissible.

It was found that at the date of the will, which was made some two years before the testator’s death, he had been married about two years. Prior to the marriage his wife had had three children, daughters, who were now living. All were minors at the testator’s death; and they had always been acknowledged by the testator, and treated by him, as his children :—

Held, that the three daughters were entitled under the above bequest.

MOTION for decree.

Joseph Horder died on the 24th of October, 1861, having by will, dated the 26th of October, 1859, after directing his debts, funeral and testamentary expenses, to be paid, and making certain specific and pecuniary bequests, devised and bequeathed all his leasehold property and all his residuary personalty to trustees, upon trust either to continue the same in specie or in the state of investment in which the same should be at his decease, or at their discretion to sell and convert the same, and invest the proceeds as therein mentioned, and stand possessed of the income upon trust to permit the same to be received by his wife *Louisa* during her life. The will then proceeded :—

“And from and after the death of my said wife, in trust as to such personal property, for all and every my daughters, in equal shares, who shall attain the age of twenty-one years, or marry.”

The testator further directed that “the respective shares of my daughters shall be received, enjoyed, and disposed of by each of them as her separate estate,” and then directed as follows :—

“In case, at the time of the decease of my said wife, any of my child or children shall not have attained the age of twenty-one years, or been married, then it shall be lawful for the trustees o

trustee . . . to apply all or any part of the yearly dividends, interest, or annual produce of the presumptive share . . . of each such child, during her minority or discoveriture, in or towards her maintenance and education, or otherwise for her benefit as the said trustees or trustee shall think proper; and that, subject as aforesaid, so much, if any, of the dividends, interest, or annual produce arising from the presumptive share of each such child as shall not be so applied as aforesaid, shall be . . . accumulated, and the accumulations thereof be added to the principal of the share . . . but nevertheless it shall be lawful for the said trustees or trustee, in their or his discretion, to apply the whole or any part of such accumulated fund in or towards the subsequent or future maintenance and education of the child from whose presumptive share the same may have arisen . . . And I do hereby further direct that it shall be lawful for my said trustees or trustee . . . during the life of my said wife, with her consent in writing . . . to apply the whole or any part of the principal . . . of the presumptive share of each or any of my said children who shall not have attained the age of twenty-one years or been married . . . in or towards the advancement . . . or otherwise for the benefit of the child to whom each such share shall presumptively belong."

Testator left his wife *Louisa* and no legitimate children him surviving. She died on the 11th of February, 1875.

The testator was married to his wife *Louisa* on the 7th of September, 1857. Previously to this, he had lived with her for many years as his wife; and she had had three children, daughters, born respectively on the 10th of November, 1850, the 18th of January, 1853, and the 29th of October, 1855. Two of the daughters had married since the testator's death.

The bill was filed on the 31st of March, 1875, by the three daughters of *Louisa Hordern*, and the husbands of the two who were married, against persons representing the next of kin of testator, and the trustees, praying for a declaration that the Plaintiffs were, under the will, entitled in equal shares for their separate use, but as to the youngest, contingent on her attaining twenty-one, or marrying, to the residuary leasehold and personal estate of the testator.

There was evidence to shew that the testator always acknow-

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ledged the female Plaintiffs as his children; that he called them his daughters, and represented them to his friends as such; and that they addressed him as their father.

There was also evidence to shew that the testator was born on the 28th of April, 1786; and that his wife *Louisa* was either forty or forty-two at the date of the marriage.

Mr. *Lethbridge*, the solicitor who took instructions for making the testator's will, deposed that the testator said to him, "I have a wife and three daughters."

*Kay*, Q.C., and *J. T. Prior*, for the Plaintiffs:—

After much discussion it is now settled that illegitimate children may take under the description of "children" if the words of the will, viewed in the light of surrounding circumstances, shew that such was the intention of the testator. Originally, no doubt, and at first sight, "daughters" means legitimate daughters only. But this testator left no lawful children. Hence the Court is bound to look at the surrounding circumstances, and then it is found that the female Plaintiffs were by the testator always called and treated as his children. Consequently they are entitled: *Holt v. Sindrey* (1); *Lepine v. Bean* (2); *Hill v. Crook* (3). The last-named authority is commented on in *Occleston v. Fullalove* (4), which otherwise has little or no bearing on the present.

*Dorin v. Dorin* (5) will be cited against us. But in that case there was the essential distinction that the words used were "my children." Here we have pointed out a particular class of children, "my daughters." The intention is plain.

In *Hill v. Crook* (6) Lord *Chelmsford* cited with approval the following passage from *Jarman on Wills*:—"Illegitimate children may take by any name or description which they have acquired by reputation at the time of the making of the will." This precisely represents the state of facts here. The female Plaintiffs had acquired the reputation of being testator's daughters at the time of making the will, as appears from the solicitor's evidence; and the Court will hold them entitled as *personæ designatæ*.

(1) Law Rep. 7 Eq. 170.

(2) Ibid. 10 Eq. 160.

(3) Ibid. 6 H. L. 265.

(4) Law Rep. 9 Ch. 147.

(5) Ibid. 7 H. L. 568.

(6) Ibid. 6 H. L. 279.

*Swanston*, Q.C., and *H. Burton Buckley*, for the next of kin:—

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There is nothing in the surrounding circumstances to indicate that the testator did not suppose he might have legitimate offspring. It is admitted that if he had had daughters after the marriage the Plaintiffs would have been excluded: *Wilkinson v. Adam* (1).

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*Dorin v. Dorin* (2) does, in effect, rule this case. There is no substantial difference between the word “daughter” and the word “children.” A “daughter” is only a female “child”; and this authority shews that before the word—whether “children” or “daughters”—must be read the word “legitimate.” We do not say it was the testator’s intention to benefit these illegitimate children; we say it was not his intention to do so; but if the Court should find that he did so intend, we then say that, there being a possibility of his having lawful daughters, the Court must set aside the intention and support the rule. This was not the will of a moribund person; the testator did not die until two years after he had made it.

In *Hill v. Crook* (3), before the birth of any of the so-named children, the ceremony of marriage had been gone through. This form having been followed by the birth of offspring, the word “children,” applied to such offspring, was held to amount to a *designatio personarum*. The Court adopted the gloss and vocabulary of the testator (4), just as a devise by a testator to “my son, the Prince of *Wales*,” supposing the will were not set aside on the ground of lunacy, would be a good devise to the Prince of *Wales*. In *Holt v. Sindrey* (5) and *Lepine v. Bean* (6), there was the same element. In the absence of all competition between legitimate and natural children, the Court found that certain persons, though incorrectly described, were sufficiently designated to enable them to take.

Great reliance has been placed on the use of the word “daughters,” coupled with the fact of there being reputed daughters and no other children, lawful or natural; but the Court will not act on mere conjecture as to whether particular persons

(1) 1 V. & B. 422, 462, 466.

(2) Law Rep. 7 H. L. 568.

(3) Ibid. 6 H. L. 265.

(4) Law Rep. 6 H. L. 278, 285.

(5) Ibid. 7 Eq. 170.

(6) Ibid. 10 Eq. 160.

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Even if the evidence amounted to proof of the fact that the woman was past the age of child-bearing, that evidence would not weigh with the Court: *Paul v. Children* (3).

It may be admitted that legitimate children will take with illegitimate, if illegitimate children are sufficiently described; but that only brings us round to the old inquiry—Are illegitimate children sufficiently described in this will? The maintenance and education clause does not, in effect, carry the matter further: *Harris v. Lloyd* (4). It merely shews that by the word “daughters” the testator meant his daughters.

*Dorin v. Dorin* (5) has been followed in *Willats v. Hooper* (before *Malins*, V.C., June 7, 1875), and *In re Ayles’ Trusts* (6).

*W. King*, for the trustees.

*Kay*, in reply:—

It is plain that the testator in this case had not the ordinary intention which a testator has in providing for his legitimate children only; for he contemplates his wife surviving him; he gives her a life estate, and after her death, he gives the property to his “daughters,” treating those daughters as infants. If he intended to provide for his legitimate daughters, why should he exclude his sons? He was not the owner of a large landed estate, which might have descended to an eldest or only son. The only possible alternative is that he intended to provide for these infant female children.

The principles are sufficiently laid down by Lord *Cairns* in *Hill v. Crook* (7); and in *Dorin v. Dorin* (8) his Lordship puts a test question, which may be readily applied to the present case. Supposing it had been in the testator’s mind not to take any notice of these children in his will, or to make any provision for them by his will, would not every word in the will be satisfied? In *Dorin v. Dorin* the answer was, “undoubtedly every word would be

(1) 5 Ves. 530.

(2) 1 V. & B. 422.

(3) Law Rep. 12 Eq. 16.

(4) T. & R. 310.

(5) Law Rep. 7 H. L. 568.

(6) *Ante*, p. 282.

(7) Law Rep. 6 H. L. 282, 283.

(8) *Ibid.* 7 H. L. 573.

satisfied." In this case it is no less plain that the expressions in his will would not be satisfied.

There is no question here of public policy; the point is one of construction only.

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BACON, V.C. :—

In this and such like cases I am compelled to regret the poverty and inaccuracy of our language. That poverty and inaccuracy it is which has given rise to all the questions which have been discussed, similar to that which has now been argued before me.

The testator, by his will, after the death of his wife, gives his property in trust for "all and every my daughters, in equal shares, who shall attain the age of twenty-one years, or marry."

Mr. *Swanston* has said, with perfect accuracy, that the word "daughter," taken by itself, means nothing more than "female child." But as this testator left no female "children" in the ordinary legal sense, there are no persons to whom this word, in its literal construction, can apply; and consequently there is good ground for the admission of parol evidence as to the surrounding circumstances. I am clearly of opinion, in this case, that the admission of such evidence is necessary for the purpose of ascertaining the real meaning of the testator.

Among all the cases that have been cited, none appears to me so valuable as that of *Wilkinson v. Adam* (1), to which Mr. *Swanston* has referred. In *Wilkinson v. Adam*, reading from the marginal note, I find as follows :—"Under a devise by a married man, having no legitimate children, to the children which I may have by A., and living at my decease, natural children, who had acquired the reputation of being his children by her before the date of the will, entitled; as upon the whole will intended, and sufficiently described."

That case resembles the present somewhat in its facts, and in principle it is undistinguishable from it. It establishes that extraneous evidence may be resorted to for the purpose of ascertaining the testator's meaning when he uses the word "children," and the principles there laid down will guide us to the decision of the



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present question. It is unnecessary to go into the particulars of that very long case; Lord *Eldon* thus concludes his judgment (1):—

“The question, therefore, comes round to this: whether, upon the contents of this will” (and, it might have been added, applying to it the results of extraneous evidence), “it is possible to say, he” (the testator) “could mean at the time of making that will any but illegitimate children; a married man, with a wife who, he thought, would survive him, providing for another woman, to take after the death of his wife, and for children by that woman, it is impossible that he could mean anything but illegitimate children; and if that devise would have comprehended legitimate children, that would be by an operation of law, that would have been an entire surprise upon him, as he could not mean legitimate children by this will.”

In *Lepine v. Bean* (2), evidence was gone into as to what was the meaning of the words “my children,” used by the testator in that case, and of similar expressions which were not unlike the words I have here to construe. The example suggested by the Master of the Rolls seems perfectly applicable to all such like cases. The Master of the Rolls puts the case of a man who has adopted children not his own, who has always called them his children, and then by will leaves property to “my children.” His Lordship says that persons so called, though not really the testator’s children, would be sufficiently designated, and might take.

It has been said that in all these cases there must be a *personæ designatio*. I do not dispute that statement, and upon the evidence here produced I am of opinion that the testator, by these words “my daughters,” did mean only those persons who were then recognised by him as his daughters; for the evidence is this, that upon several occasions he had treated these children as his daughters, that he called them by the name of his “daughters,” that they called him by the name of “father,” and that he had introduced them to his acquaintances as his children. That establishes the fact, to my mind, that when the testator was speaking of “my daughters” in his will he meant those persons whom he had shewn to his friends and acquaintances as his daughters; that he

(1) 1 V. &amp; B. 468.

(2) Law Rep. 10 Eq. 160.

meant them, and no others. I think that is a designation which cannot be disputed, because, as Lord *Cairns*, in *Hill v. Crook* (1), said, "You must adopt the nomenclature used by the testator." The testator did call the female Plaintiffs his daughters. That was his way of designating them, and without going into the testimony which has been filed as to the instructions given for the preparation of the will, which, of course, is not evidence, it does appear, and this is perfectly admissible, that the testator himself, in conversation with the solicitor, said that he had "a wife and three daughters."

Then we find, upon the authority of *Wilkinson v. Adam* (2), that all difficulty is removed.

The case of *Hill v. Crook*, though not the same as to facts, is the same in substance. In moving the judgment of the House of Lords, not only did Lord *Cairns* lay it down that parol evidence as to surrounding circumstances is admissible, but he says (3) that "in order to interpret the words of the will, it is always not only allowable, but it is the duty of the Court to obtain the knowledge which the testator had of the state of his family."

The result, as I understand it, is, that if the Court should come to the conclusion that what is stated is accurately stated, and that the evidence so stated excludes the presumption that the testator meant only legitimate children, the Court must act upon the understanding that he did not mean legitimate children—that is, giving the same weight to the evidence as would be given to it in any other civil case, or in any criminal case, where the presumption of a culprit's supposed guilt has to be considered.

Upon that principle, I think this case must be decided; and, so far, the case of *Hill v. Crook* does, in my opinion, govern the present.

Then Mr. *Swanston*, with great distinctness and earnestness, argued that *Dorin v. Dorin* (4) is an authority the other way, and that, being the last authority on the question, it ought to be more readily received and followed than the preceding cases. But the case of *Dorin v. Dorin* is clearly different from the present, and was decided on totally different principles from those which

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(1) Law Rep. 6 H. L. 285.

(2) 1 V. &amp; B. 422.

(3) Law Rep. 6 H. L. 283.

(4) Ibid. 7 H. L. 568.

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apply here. In that case the illegitimate children were born before the marriage, and the testator, by his will, made the day after the marriage, after mentioning his wife by name, spoke of "our children," and of "my children by her." It was plain that every word of that will could be satisfied by reading "children" as legitimate children, and that is the ground on which Lord Cairns (1) puts his decision. And if, as Lord Cairns said, every word in the will would be so satisfied, there would be no necessity to have recourse to extraneous evidence. When, on the other hand, a case arises in which it is necessary to have recourse to extraneous evidence, then the case of *Dorin v. Dorin* (2), though eminently useful as a guide, has no application.

Upon the authority of *Wilkinson v. Adam* (3), if it be necessary to resort to it, I should come to the conclusion that, it being proved as a fact that when the testator used in his will the expression "my daughters," he meant the persons whom he referred to in his conversation with Mr. *Lethbridge* when he said, "I have a wife and three daughters," and whom he had introduced to others as his daughters—the evidence adduced on that subject leaving no doubt on my mind—the Plaintiffs are entitled under this residuary bequest.

There will be a declaration accordingly; all further proceedings in the suit will be stayed; and the costs of all parties will come out of the estate.

Solicitors for Plaintiffs and Trustees: *Lethbridge & Son*.

Solicitors for next of kin: *Hopwood & Sons*.

(1) Law Rep. 6 H. L. ~~473~~.

(2) Law Rep. 7 H. L. 568.

(3) 1 V. & B. 422.

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*Will*—*Direction to accumulate Rents for Twenty-one Years—Limitation of Real Estate on Failure of Issue in tail male of a Person unborn—Destination of Rents of Real Estate, and of Proceeds of Personalty directed to be laid out in Purchase of Land, after the Expiration of the Twenty-one Years.*

Testator devised all his real estates to trustees and their heirs. He directed that his mansion-house and furniture should not be let or occupied except by the persons put therein to keep the same in good order "until the end of twenty-one years after my death, or until my brother and three sisters" (to whom he gave annuities) "are all dead." He declared that his trustees should apply the rents of all his real estate in paying the annuities and keeping the mansion-house and furniture in repair, and should accumulate the surplus, and lay out the accumulations in the purchase of real estates to be settled to the same uses. He declared that "no such accumulations shall under any circumstances exceed the term of twenty-one years" from his death. He declared that "at the end of the said term of twenty-one years from the day of my death, or if my said brother and three sisters shall all die within that period, then on the death of the survivor of them, whichever event shall first happen," the trustees should stand possessed of the real estates, upon trust to pay the annuities, and subject thereto, in trust for the first son of his brother in tail male; and failing such issue, in trust for the second and every other younger son of testator's nephew *W.*, in tail male; and failing such issue, in trust for the first and every other son of testator's nephew *H.* in tail male; and failing such issue, over; with an ultimate limitation, "failing such issue," upon trust to sell the estates for the benefit of testator's next of kin.

Testator's brother died without issue before the expiration of the twenty-one years term. At the expiration of the term, two of testator's sisters, annuitants, were still living. His nephews *W.* and *H.* were living, each having one son only, and several daughters.

There not having been born a second son of *W.*, the son of *H.* claimed the estates as tenant in tail in possession indefeasibly, or as tenant in tail in possession, subject to defeasance in the event of a second son of *W.* being born:—

*Held*, that during the suspense period, until it should be ascertained whether or not there would be a second son of *W.*, the rents of the real estate and the proceeds of the personal estate, after the expiration of the twenty-one years term, were undisposed of, and belonged to the heir-at-law and next of kin respectively.

*Sidney v. Wilmer* (1) observed upon.

PETITION.

*affirmed 3rd D. 874. C.C. 6.*  
Charles Gery Milnes, of Beckingham, in the county of Lincoln, died in November, 1854.

(1) 25 Beav. 260; 4 D. J. & S. 84.

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By his will, dated the 4th of October, 1854, he gave annuities to his brother and three sisters respectively. He devised to trustees, their heirs and assigns, all his real estates (chargeable as to his estates in the county of *Lincoln* with the annuities), upon trust, amongst other things, that his share in an estate at *Keyworth* should be sold, and that his mansion-house at *Beckingham*, out-buildings, pleasure-grounds, and premises belonging thereto, might not be let or occupied except by the persons put therein by the trustees to keep the same in good order “until the end of twenty-one years after my death, or until my brother and three sisters are all dead,” and that all his plate, linen, china, tapestry, books, prints, pictures, household goods, and furniture, thereafter called heirlooms, might remain in his mansion-house, and be kept in good order “whilst the same shall be so unoccupied.”

He then proceeded as follows:—

“And I further will and declare that my said trustees, or the survivors or survivor of them, his heirs or assigns, shall receive and take the rents and profits of all my real estates (except of my said mansion-house and premises, which are not to be let), but including the rents of my estate at *Keyworth* till the same shall have been sold, and I direct them to apply such rents and profits in manner following, (that is to say) in paying the said annuities and keeping my said mansion-house, furniture, heirlooms, grounds, and premises in good repair as aforesaid, and in discharging all the expenses of repairing and keeping my real estate in a good state and condition, and in paying the salaries of land agents or other persons whom the said trustees may employ to advise or assist them in carrying out the trusts of this my will, and in keeping down the interest of any debts or annuities chargeable on my real estate, and all other costs and expenses incident to the execution of the trusts of this my will: And I further will and declare that my said trustees or trustee shall apply the surplus of the said rents and profits in paying off any debts or charges that may exist on my real estate; and after the same shall all have been paid, then I desire them to invest the surplus of such rents and profits, with the accumulations thereon, in the purchase of freehold or copyhold estates in *England*, and settle the estates so to be purchased to the uses and in the manner to and in which I have by

this my will settled my estates in the county of *Lincoln*, or as near thereto as circumstances will admit of. And I direct that in the meantime, and until such investments shall be made, the said surplus of the rents and profits, with the accumulations thereon, shall from time to time be invested in their own names on government or real securities, so that the same may accumulate in the way of compound interest. But I declare that no such accumulations shall, under any circumstances, exceed the term of twenty-one years from the day of my death. And I further will and declare that at the end of such term of twenty-one years from the day of my death, or (if my said brother and three sisters shall all die within that period), then on the death of the survivor of them, whichever event shall first happen, my said trustees and the survivors and survivor of them, his heirs and assigns, shall hold and stand possessed of all my real estates (except at *Keyworth* aforesaid), but including the said estates so to be purchased with the said surplus rents and profits, with the accumulations thereon as aforesaid, upon the trusts following (that is to say), upon trust with and out of the rents and profits thereof to pay any annuities which may then be payable out of my real estate, and subject thereto, in trust for the first and every other son of my said brother *Thomas Hercules Milnes*, successively, according to seniority of birth, and the heirs male of the body of each such son; and failing such issue, in trust for the second son and every other younger son successively, according to seniority of birth, of my nephew *William Hugh Wade-Gery*, Esquire, and the heirs male of the body of each such son; and failing such issue, in trust for the first and every other son, successively, according to seniority of birth, of my nephew *Hugh Wade-Gery*, Esquire, and the heirs male of the body of each such son; and failing such issue, to the first son of the said *William Hugh Wade-Gery* in tail male; and failing such issue, in trust for my said nephew *Hugh Wade-Gery*, for his life, without impeachment of waste; and after his decease, in trust for the first and every subsequent daughter successively in tail male of the said *William Hugh Wade-Gery*; and failing such issue, in trust for the first and every subsequent daughter successively in tail male of the said *Hugh Wade-Gery*; and failing such issue," testator directed and declared that his said trustees

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should sell all his real estate, and he gave all the moneys arising from such sales, and from the rents and profits thereof till such sales, unto the persons who, under the Statutes of Distribution, should then be his next of kin.

Testator directed that his plate, books, pictures, household goods, and furniture should be used and enjoyed as heirlooms, and that every person who should become entitled to the possession or the receipt of the rents and profits of his real estates should take his name and arms; and he gave and bequeathed all his personal estate and effects to his trustees upon trust to sell and convert, and to pay his debts, funeral and testamentary expenses, and legacies, except mortgage debts, any deficiency to be paid out of the rents of his real estate; and to stand possessed of the clear surplus, "upon the same trusts and for the same purposes as I have hereinbefore declared, of the rents and profits of my real estate in the county of *Lincoln*."

He also declared as follows:—"Provided also, and I further declare that during the said term of twenty-one years, and whilst any son or sons of the said *William Hugh Wade-Gery* shall be under the age of twenty-one years, or if there shall be no such son or sons, then whilst the son or sons of the said *Hugh Wade-Gery* shall be under the age of twenty-one years, it shall be lawful for my trustees or trustee from time to time to pay out of the rents of my real estate such sums as they or he shall think desirable for or towards the education of any one or more of such son or sons."

The testator's brother and heir-at-law, *Thomas Hercules Milnes*, died on the 31st of March, 1860, without issue.

Two of the testator's three sisters named in his will, who were annuitants, were still living.

The testator's nephews named in the will, *William Hugh Wade-Gery* and *Hugh Wade-Gery*, were both living, and each had one son only and several daughters living, all under age.

The bill was filed on the 25th of February, 1870, by the infant son of testator's nephew *Hugh*, against the trustees, for execution of the trusts of the will.

On the 24th of November, 1871, an administration decree was made, and the Chief Clerk's certificate was dated on the 4th of March, 1875.

The term of twenty-one years from the testator's death expired in November, 1875.

The Plaintiff now presented a petition stating the above facts, and praying for a declaration that he was now absolutely entitled as tenant in tail male in possession to the real estates devised by the will, and was entitled to the personal estate under the trusts of the same, and to the use and enjoyment of the heirlooms thereby bequeathed.

The persons now entitled to the testator's real estate (if any) which descended to his heir-at-law, and representing the testator's next of kin, also presented a petition, praying for a declaration that the income which had accrued since the expiration of the term of twenty-one years from the testator's death, and the income which should thereafter accrue until *William H. Wade-Gery* should have a second son or should die, which should first happen, on the real estates devised, and on the personalty liable to be laid out in the purchase of land, was undisposed of by the will; and that during the like period the use and enjoyment of the heirlooms were also undisposed of by the will; and for a direction that the income might be paid and allowed to the Petitioner accordingly.

Sir *H. Jackson*, Q.C., and *Yate Lee*, for the Plaintiff:—

The Plaintiff is indefeasibly entitled as tenant in tail in possession. Failure of "such issue," that is to say, failure to come into being of a second son of *William Wade-Gery*, means failure during the period of twenty-one years—an event which has not happened.

Or, the Plaintiff is entitled as tenant in tail in possession, but (the whole estate being in the trustees) he is liable to be dispossessed if a second son of *William* should be born.

In either event, the Plaintiff is entitled to be let into possession of the rents of the real estate at once, and to have maintenance out of them.

The testator had no intention of dying intestate as to any part of his property. His direction that no accumulations were to exceed the term of twenty-one years was made in view of the *Thellusson Act*. He intended the period of twenty-one years to be the particular estate, upon the determination of which the estates were to vest

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immediately. The Court is always in favour of constructions which lead to the earliest possible vesting.

The ultimate devise favours this construction. "Failing such issue," the trustees are to sell for the testator's next of kin. "Failing such issue" must mean failure at the end of the twenty-one years. The Court will not impute to the testator an intention of giving to trustees a power, after an indefinite period of suspense, to sell in favour of a testator's next of kin.

*Hemming*, Q.C., and *Maidlow*, for the representatives of the heir-at-law and of the next of kin respectively :—

During the period of suspense until a second son of *William Wade-Gery* is born, there is an intestacy.

The whole of the legal estate is vested in the trustees. They are to accumulate for twenty-one years. That is not strictly a term; and even if it were, it would not support the limitation to the first son of *T. H. Milnes* as a contingent remainder. There is no life estate given to *T. H. Milnes*. Consequently the limitation to the first son of *T. H. Milnes* takes effect only as an executory devise; and in like manner the limitations to the Plaintiff and the rest take effect only as executory devises, until some person comes into existence in whom one of them may vest, when the subsequent estates will become remainder. Until then, they are all contingent. Thus the limitation to the Plaintiff is contingent on failure of male issue of the second son of *William*. Has such issue failed? Clearly not.

It has been argued that failure of such issue of *William* must mean failure within the period of twenty-one years. But there are no such words in the will.

Nor is this a gift to the eldest son of *Hugh*, i.e., to the Plaintiff, subject to defeasance on birth of a second son of *William*. That is a common form of limitation which might have been, but which has not been, here expressed. The gift to the Plaintiff is contingent until a second son of *William* is born, or until *William* dies without having had a second son.

In this state of things *Hodgson v. Earl Bective* (1) has direct

(1) 1 H. & M. 376, 391, 393; S. C. *Countess of Bective v. Hodgson*, 10 on appeal from part of the decree, H. L. C. 656. 10 June 1853

application. In that case, as in this, there was an executory devise to the second son of Lady *Bective* (who had only one son, Lord *Kenlis*, living), and in default of such second son, to Lord *Kenlis* for life, with remainders over. No one in that case suggested that Lord *Kenlis* took a vested estate, subject to its being divested. The question was, what was to be done with the income of the real and personal estate until the second son came into existence; and the Court held that as to the real estate the rents were undisposed of and went to the heir. As to the income of the personalty, it followed the corpus, and had to be accumulated; but, as Lord *Westbury*, C., on the appeal, pointed out, for twenty-one years only, so as not to infringe the provisions of the *Thellusson Act*. After the expiration of the twenty-one years, the income of the personalty was held by the House of Lords to belong to the next of kin.

The case is also governed by the authority of *Hopkins v. Hopkins* (1), the rule in which case has been departed from, but only to the extent to which it clashed with *Acroyd v. Smithson* (2), the principle of which had not been worked out at the date of *Hopkins v. Hopkins*. This is fully explained by Lord *Westbury* (3).

Nor is this a "mixed fund," the rule as to which is laid down by Lord *Eldon* in *Genery v. Fitzgerald* (4), and illustrated by Lord *Hatherley*, then *Wood*, V.C., in *Hodgson v. Earl Bective* (5).

The contention of the Plaintiff appears to be that he would read the words "at the end of the said period of twenty-one years," after the words "failing such issue," into every one of the limitations. But the settled rules of construction are the other way. Besides, the manifest intention was to provide for children of the testator's nephew, and it is inconceivable that the testator intended none of the children of nephews to take unless they should be born within the period of twenty-one years, and that at the end of that period the estates were to be sold for the benefit of the next of kin. Such a construction would afford too short a period within which children must be born in order to be qualified to take. That being so, the intermediate rents of realty and

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(1) Cas. t. Tal. 44, 51.

(2) 1 Bro. C. C. 503.

(3) 10 H. L. C. 666, 667.

(4) Jac. 468.

(5) 1 H. &amp; M. 394.

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 ——— *Kay*, Q.C., and *Begg*, for the trustees:—

It has been suggested that we should argue that an unborn second son of *William Wade-Gery*, who may possibly come into existence, will be entitled, but we do not see our way to this.

The attention of the Court should, however, be drawn to the decision in *Sidney v. Wilmer* (3), decided on appeal on the 8th of December, 1863, by Lord *Westbury*, who, on the 4th of March, 1864, moved the judgment of the House of Lords in *Countess Bective v. Hodgson* (4).

*Hemming*, Q.C., on *Sidney v. Wilmer*:—

The case does not appear to have ever been followed. It was not cited in *Countess Bective v. Hodgson*, and the authorized report of it was not published when the judgment of the House of Lords in *Countess Bective v. Hodgson* was delivered. The part of the decision in *Sidney v. Wilmer* which applies to the present contention was a subsidiary part of the case. Moreover, the decision in *Sidney v. Wilmer* was appealed from, with the result partially stated in the report (5), the fact being that the Plaintiffs gave up £5000 out of £8000 rather than attempt to support the judgment before the House of Lords; and this part of the history of the case, as much as any other, must be considered to have been present to the mind of Lord *Westbury* when the case of *Countess Bective v. Hodgson* was very shortly afterwards before him on appeal. The two cases cannot stand together on this point, and there is no doubt which is right and conclusive.

Sir *H. Jackson*, in reply:—

We press upon the Court the first alternative, viz., that the Plaintiff is entitled absolutely as tenant in tail in possession.

The difference between this case and *Hodgson v. Earl Bective* (6)

(1) Law Rep. 18 Eq. 9.

(2) Ibid. 11 Eq. 559.

(3) 25 Beav. 260; 4 D. J. & S. 84.

(4) 10 H. L. C. 656.

(5) 4 D. J. & S. 113.

(6) 1 H. & M. 394.

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is, that here we have a fixed period of twenty-one years, during which the mansion-house is to be kept shut up, with a declaration that under no circumstances is there to be an accumulation beyond twenty-one years. That is a proviso overriding the whole will. At the end of that period interests are to take effect in possession. In whose favour? In favour of the person who then answers the description.

This is not a gift, either at the end of twenty-one years, "or" at the death of the survivor of the annuitants—which would correspond to *Hodgson v. Earl Bective* (1); it is a gift at the end of twenty-one years, or sooner, if the survivor of the annuitants should die before.

The twenty-one years may not be a term in the strict sense, but the circumstance of its having been limited is all-important, as shewing what was the intention of the testator.

In the second alternative we rely on the decision in *Sidney v. Wilmer* (2).

BACON, V.C.:—

As far as this is a question of construction, which is one of the grounds—and I was going to say the principal ground—upon which Sir *Henry Jackson* has put his claim, no doubt there is a great deal to be said in favour of the Plaintiff's construction.

The testator has provided for the manner in which his testamentary dispositions are to be made effectual, and the Court has very often exercised a large discretion in construing a will by supplying more than is said by the testator, for the purpose of giving effect to what the Court is satisfied was the true intention. But upon this will I cannot find any expressed intention by the testator to dispose of the property, after the expiration of the period of accumulation which he mentions, in favour of any but persons whose rights are merely contingent. No doubt, he did not consider that there might be an interval between the expiration of the twenty-one years he mentions and the period at which the rights could be ascertained. The contingency of that interval occurring has happened, and as to what is to be done in that event

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(1) 1 H. & M. 394.

(2) 25 Beav. 260; 4 D. J. & S. 84.

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he is silent. What authority have I, in construing this will, to hold that he does by his will say (for this is what I am asked to do) that when the twenty-one years have expired, if it is then doubtful which of the persons entitled under the several limitations, executory as they are, will become ultimately entitled, the one who presents himself first shall have it in the interval? I can find no authority for saying that. I am dealing with it now only as a question of construction. If I were to adopt the suggestion of the Plaintiff's petition, and declare that the Plaintiff is entitled to the possession of the real estate, and the enjoyment of the income of the personalty, and years afterwards a person with a better title, namely, a second son of *William Wade-Gery*, should be born, what account would the Court be able to render to the person who would then be clearly entitled to the enjoyment of the estate during the interval? If the Plaintiff were to die after the Court had made that declaration, his heir-at-law, or legal personal representative, would be entitled, however long the interval might be, to the enjoyment of this property. Is that anything like what I can impute to the testator as his intention? The testator had a right to dispose of the property, and if he has failed to dispose of it entirely, the law has pointed out what the consequence is. The Petitioner is entitled to all the testator has given him. Can I say that he has given him anything, if the event shall happen that a second son should be born? It is impossible for me to do so. I confess, keeping in mind that rule of which I have been reminded, that the Court leans as strongly as it can against intestacy, there is a strong temptation to adopt the construction which Sir *Henry Jackson* puts upon the will, because such a construction would be more useful and rational. But that does not justify me in putting words into this will which I do not find in it. I find no gift to the Plaintiff at the time when the twenty-one years shall have expired; and if I were to make the declaration he asks for I must make it on the assumption that the will contains those words. I have no authority to do that. Therefore, upon the question of construction, I am against the Plaintiff.

But if I am asked, as a matter of authority, to decide in favour of the Plaintiff, then I am bound to decide against him. It is impossible for any serious purpose to distinguish this case from that

of the *Countess Bective v. Hodgson* (1). The same point arose there; the same rule must be applied as was laid down as being the law by the highest authority which we know of, namely, the House of Lords.

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In another case referred to, a case decided by one of the same Judges who decided the case of *Countess Bective v. Hodgson* in the House of Lords, I mean *Sidney v. Wilmer* (2), a directly contrary decision was arrived at; the Court in that case being influenced to some extent, I cannot doubt, by the construction that was put on the will, and a great deal more by the general principle to be found in the judgment; and if there were no such decision as that of the *Countess Bective v. Hodgson*, I do not hesitate to say that I would rather adopt the principle of *Sidney v. Wilmer* than the principle of the decision in *Countess Bective v. Hodgson*. But I am bound by this latter authority. I have no alternative; the law has plainly decided the question; it is my duty to obey the law; and I should be acting contrary to the decision if I were to yield to any temptation I might feel, and to the strong solicitation which has been presented to me, not to leave the income of this property any longer in suspense, not to wait for an event which may never happen, and in all probability never will happen, and not to hand over the income of the property in the meantime to the heir-at-law and the next of kin, who nevertheless are the persons whom the law has designated as being entitled to the intermediate enjoyment if the testator has not taken it away from them. If he has given it to nobody else, he has not taken it away from his heir-at-law and next of kin; and, in my opinion, the heir-at-law and the next of kin are therefore entitled to the intermediate proceeds of this estate, real and personal, until it shall be ascertained whether the contingency upon the happening of which the Plaintiff will become entitled will happen.

As to the chattels which were directed to be held as heirlooms, and which are not affected by the provisions of the *Thellusson Act*, the trustees must take care of them. The heir-at-law will not, in my opinion, be entitled to them. If the house has to be let, the furniture must be let with it, and the trustees must take as much

(1) 10 H. L. C. 656. 10 June 1876

(2) 25 Beav. 260; 4 D. J. &amp; S. 84. 10 June 1876

V.-C. B. care of it as they can. They can always apply for directions in Chambers.

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The following are minutes of the order :—

An order on both petitions.

Declare that upon the expiration of the term of twenty-one years the rents and income are undisposed of until it is ascertained whether there will be a second son of *William Hugh Wade-Gery*.

Declare that the heir-at-law and next of kin are entitled thereto respectively.

Direct an inquiry what part of the income arises from realty and what from personalty.

Costs of all parties as between solicitor and client out of the fund.

Solicitors for Plaintiff and Heir-at-law: *A. F. & R. W. Tweedie*, agents for *Day & Wade-Gery, St. Neot's*.

Solicitors for Trustees: *J. E. Fox & Co.*

V.-C. B.

*In re* WEST HARTLEPOOL IRON COMPANY.

1876

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Jan. 27.

*Winding-up—Contributory—Trustee of Shares for Company—Registration.*

As a security for the performance by *A.*, a vendor, of his engagement to guarantee the purchasing company a certain dividend for a period of years, it was agreed, and such agreement was incorporated into the articles of association, that the shares which formed part of *A.*'s purchase-money should be placed in the power of the company by means of a transfer to two of the directors as trustees for the company, but who were not to be registered as holders of the shares except by their own direction.

The shares were transferred by *A.* to *B.* and *C.*, two of the directors, and the share certificates, the deed of transfer, and the certificate of registration in the books of the company of the transfer deed were deposited with the bankers of the company for safe custody, but afterwards withdrawn from them to prevent their claiming any lien. After the winding-up order the names of *B.* and *C.* were for the first time placed by the official liquidator on the register of shareholders and also on the list of contributories :—

*Held*, that *B.* and *C.* were not liable to be placed on the share register or list of contributories in respect of the shares which had been transferred to them as trustees for the company, under the express provision that they should not, except by their own direction, be registered as the holders of such shares.

THIS was a summons on behalf of *William Gray*, of *West Hartlepool*, shipbuilder, that the liquidator of the *West Hartlepool Iron*

*Company, Limited*, might be ordered to rectify the register of members of the company by striking out the names of the applicant and *J. W. Richardson* therefrom in respect of the shares held by them under a transfer deed of the 20th of November, 1874; and that the liquidators might also be ordered to remove the names of *Gray* and *Richardson* from the list of contributories of the company in respect of such shares.

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The company was incorporated in June, 1874, for the purpose of carrying out an agreement of the 20th of May, 1874, for the purchase and acquisition by the company of the iron works at *West Hartlepool* belonging to *Thomas Richardson*. By the agreement of the 20th of May, 1874, it was provided that the purchase-money of the property should be paid to *Richardson* as follows:—£40,000 in 1000 shares of the intended company of £50 each, upon which £40 upon each share should be credited as having been paid up, and which shares were termed “vendor’s shares,” and the remainder of the purchase-money in the manner provided by the agreement. Certificates of the vendor’s shares were to be issued and delivered to *Richardson* immediately on the incorporation of the company and the allotment of the ordinary shares, and he was to be entitled to receive the dividends in respect of such shares. By this agreement *Richardson*, on his part, guaranteed to the company, for a term of five years from the 1st of May, 1874, that the net profits of the company should be sufficient to pay a yearly dividend not less than 10 per cent. on the paid-up capital. In case the net profits should be insufficient to pay the annual amount so guaranteed, *Richardson* undertook in each year to make up the deficiency, with provisions for recouping him out of any excess in subsequent years.

As a security for the due performance of the guarantee it was further agreed that *Richardson* should enter into a proper deed of covenant with the company for performance, and that performance should be further and collaterally secured by the vendor’s shares being assigned to and vested in *J. W. Richardson* and *William Gray*, who should hold the same upon trust to secure the performance of the guarantee; and that *Richardson* should enter into a proper deed vesting the “vendor’s shares” in *J. W. Richardson* and *Gray*, and conferring on them legal and absolute



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power to sell, charge, or otherwise dispose of the same shares in the event of any breach or non-performance of the guarantee of *Richardson*, and that such deed should contain a sufficient indemnity by the vendor to *J. W. Richardson* and *Gray*, as such trustees, in respect of any sale or disposition which they might make of the "vendor's shares."

The terms of this agreement were incorporated into the articles of association, which provided (Art. 37) that the articles relating to registration of transfers and registration should not be construed as applying to the said "vendor's shares" for the time being subject to the said guarantee mentioned or referred to in the said agreement of the 20th of May, 1874, except so far as the directors should otherwise determine or treat the same as applicable thereto, "but the company may, by the direction of the trustees or trustee in whom the said 'vendor's shares' may for the purposes of such guarantee for the time being be vested, register any of such last-mentioned shares as transferred, either under transfers thereof to be made by the said *Thomas Richardson*, or of any sub-transfers in virtue thereof respectively, and may register such transfers either in the names or name of the said trustees or trustee, or of any purchaser or sub-purchaser, or other person or persons as the said trustees or trustee may direct, notwithstanding that the calls on any such shares may not have been fully paid, or notwithstanding the absence of intermediate registration, or notwithstanding the death of the said *Thomas Richardson*; and it shall not be lawful for the company, except by the direction in writing, and signed by the said trustees or trustee, to register them or him as the holders or holder of any such shares; nevertheless such trustees or trustee, if registered, shall not thereby become liable to the company for any call made in respect of any of the said shares for which they or he shall be so registered, or any other liability in respect thereof; but the said *Thomas Richardson*, during the continuance of the said guarantee, shall be liable for such calls as if he was the registered holder of such shares."

On the 30th of June, 1874, 1000 shares, each of which was credited with £40 as paid up thereon, were allotted to *Thomas Richardson*, and his name was entered on the register of shareholders as the holder of them.

In accordance with the agreement of May, 1874, a transfer of the 1000 shares from *Thomas Richardson* to *J. W. Richardson* and *Gray*, two of the directors of the company, together with a deed of trust, was executed on the 20th of November, 1874.

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The deed of transfer was deposited in the office of the company, and according to the counterfoil of the certificate in the books of the company the transfer of the 20th of November, 1874, was registered on the 10th of March, 1875. Upon the register of shareholders, however, the name of *Thomas Richardson* alone appeared as the holder of the 1000 vendor's shares at the date of the winding-up.

In March, 1875, the certificates of the 1000 shares, together with the deed of transfer and the certificate of registration of the transfer, which was as follows:—"This is to certify that a deed of transfer dated the 20th November, 1874, duly executed and attested, transferring 1000 shares, 3881—4880, both inclusive, in the *W. H. Iron Co., Limited*, from *Thomas Richardson*, of *West Hartlepool*, to *J. W. Richardson* and *William Gray*, has been deposited in the office of the company and registered in their books the 10th March, 1875. *J. Wood*, Secretary"—were deposited by the directors of the company with Messrs. *Backhouse*, bankers of the company, for safe custody.

On the 12th of April, 1875, a resolution was passed that the certificates of the 1000 vendor's shares, together with the transfer to *Gray* and *J. W. Richardson* as trustees, be deposited at the *National Provincial Bank of England* for safe custody; the object being to remove the share certificates, &c., from the custody of Messrs. *Backhouse*, lest that firm should claim a lien on them for the debt due from the company.

On the 8th of July a resolution was passed for voluntarily winding up the company, and on the 30th of July, 1875, the voluntary winding-up was, by the Court of Appeal, ordered to be continued under supervision.

*J. W. Richardson* had since become bankrupt. The liquidator having caused Messrs. *Gray* and *J. W. Richardson* to be registered as the holders of the 1000 vendor's shares transferred to them as trustees for the company, and since placed them on the list of contributories, this summons was taken out by *Gray* to have the

V.-C. B. names of himself and *J. W. Richardson* removed from the register and list of contributories.

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*Kay*, Q.C., and *Caldecott*, for *Gray*, in support of the summons :—

The act of the liquidator in placing Messrs. *Gray* and *Richardson* on the register as the preliminary to enforcing liability from them as contributories was not authorized, and they are entitled to have their names removed. The test of their liability is not whether they were merely trustees of these vendor's shares, but whether their names were, or ought to have been, as part of the arrangement, originally placed on the register. As trustees whose names were not on the register, and to whom these shares were transferred in trust for the company with an express provision that their names should not be placed on the register except by their own direction, neither the company, nor the company through the liquidator, could insist upon having them put upon the list as contributories: *Saunders' Case* (1). But if, though merely trustees of the shares for the company, they had by their own act been placed upon the register and thus held themselves out to creditors as owners of the shares, they would be liable as contributories, though there might be a right to indemnity from the company for payments made in respect of shares in which, though the registered holders, they had no beneficial interest: *Chapman and Barker's Case* (2).

*Swanston*, Q.C., for *Fletcher*, the trustee in liquidation of *Richardson*, followed on the same side.

*Sir H. Jackson*, Q.C., and *H. Burton Buckley*, for the liquidator :—

Messrs. *Gray* and *J. W. Richardson* have been rightly placed on the register and list of contributories, as we say that there was, before the winding-up, that which was tantamount to a registration of their names as shareholders; and if so, the applicants cannot call in aid the 37th article of association, which provides that registration in their names of the vendor's shares shall not render the persons to whom, as trustees, the shares are transferred liable for calls. Any such provision in limitation of the ordinary

(1) 2 D. J. & S. 101. 10 June 75 (2) Law Rep. 3 Eq. 361.

liability attaching to shares is nugatory and inoperative: *Dent's Case* (1); and the mere registration of the articles of association is not sufficient to give validity under the *Companies Act*, 1867, s. 25, to the antecedent unregistered contract with *Richardson*, or exempt the holders of the particular shares from liability to registration: *Crickmer's Case* (2). Persons accepting shares in whatever capacity are subject to all the liabilities of shareholders: *Addison's Case* (3); *Black & Co.'s Case* (4). In this case the argument, that by not having been actually registered the names of *Gray* and *J. W. Richardson* were not held out to creditors as the owners of the shares, fails entirely, as there was not only a complete acceptance by them of the shares, but a certificate that the transfer to them had been registered was issued and deposited with creditors of the company; and, as directors of the company, such deposit must be taken to have been made with their knowledge: *Ex parte Brown* (5). *Saunders' Case* (6), which has been relied upon by the applicants as shewing that the company cannot insist upon having their own trustees put upon the list as contributories, was an early decision upon the Act, and is not in accordance with the later authority, *Chapman and Barker's Case* (7); and, moreover, is clearly distinguishable in its circumstances from the present case.

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BACON, V.C.:—

If I were to listen to the application of the liquidator to place the names of these gentlemen upon the register, I should be doing a thing directly at variance with common honesty and common sense. If the law required me to do it I must do it, but I feel myself under no such obligation. The law has been distinctly settled in *Saunders' Case*, and the attempts which have been made to diminish the weight of the authority of that case have been, in my opinion, wholly unsuccessful. I cannot, because the case happened early in the history of joint stock companies, say that the Judges who decided it were less able to decide it

(1) Law Rep. 8 Ch. 768.

(2) Ibid. 10 Ch. 614.

(3) Ibid. 5 Ch. 294.

(4) Law Rep. 8 Ch. 254.

(5) 19 Beav. 97.

(6) 2 D. J. &amp; S. 101.

(7) Law Rep. 3 Eq. 361.

10/11/1876



V.-C. B. from its being a new case than if they had had to decide it to-day with the benefit of all the cases since decided. It is clear, 1876  
GRAY'S CASE. plain, and explicit, and covers in every respect every part of the case before me. In the present case the company agree to buy the business of *Thomas Richardson*, and to pay him a part of the purchase-money, viz., £40,000, to be represented by particular shares. He, on his part, undertakes to guarantee a profit of 10 per cent. for some years. The company are not satisfied with his mere covenant and guarantee, but they say, "We, the company, will have a hold upon the shares which we part with to you now, viz., you are to be registered as the owner of the shares, but we are to have the power to make those shares or their value available for the purpose of securing the performance of your guarantee." That is the whole transaction. Is there anything illegal or improper in that? As they could not take a transfer to themselves, that being in law and even in physics impossible, they select two of their own body and ask them to become trustees, and these gentlemen consent to become trustees, but with this express condition, that they, who have no beneficial interest in the matter, and who are to have no profit whatever, shall not be entered upon the register of shareholders without their written consent, because that would place them under certain legal liabilities. In the face of that plain contract I am asked to hold that what has been done is equivalent to a registration, which would be altogether to omit and neglect what is the real nature of the transaction. A person on the list of shareholders is, no doubt, liable as a shareholder. These gentlemen never were upon the list of shareholders; not by any accident, not by any neglect of duty, not like *Ex parte Brown* (1), where a director was held to be cognisant of all the proceedings of the company of which he was a director; nothing omitted, no attempt to escape the liability, but a plain positive contract, that although they agree to hold these shares, they also agree that they shall not be registered but with their own consent. But suppose some time after the transaction had taken place the company or the directors had, in violation of the articles and of the plain contract between the parties, put the names of these two gentlemen upon the list of share-

holders, and there had been no winding-up and no insolvent company. It is admitted that they might in this Court or anywhere else have insisted upon their names being removed. If they could have done that, it is clear that their names ought not to have been, never could be, and never have been properly put upon the list of shareholders.

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The case before Lord *Hatherley*, *Chapman and Barker's Case* (1), is a totally different case from this. Lord *Hatherley* does not express himself as doubting the propriety of the decision in *Saunders' Case* (2); and the distinction between that (*Chapman and Barker's Case*) and this is, that the name of the person there had been put upon the register with his consent. Therefore the case which the Lords Justices decided had no application to the case before Lord *Hatherley*, and it did not interfere in the slightest degree with the decision of Lord *Hatherley*. Then am I to say for any reason that either the policy of the Act of Parliament has been departed from, or that the interests of the creditors are prejudiced by what has been done in this case? There is no pretence for saying so. There has been a certificate of transfer issued for the purpose of completing—what?—the title of the company to these shares. The names of their trustees are entered in it, as of necessity they must be. The documents are deposited for safe custody, not for a loan of money, although it would not have made any difference if that had been the case—I mention it only because I think the company may be acquitted of any intention to depart from their plain contract with the two trustees. They were deposited with the company's bankers for safe custody. How does that help or mend the case in the slightest degree? It appears to me that upon no ground—neither upon the most strict construction that can be put upon the Act of Parliament or any part of it, nor by reference to the policy of the Act or any single feature of it—can it be said that these gentlemen, by permitting their names to be used in order that the company might make more available the security which the shares present to them, have therefore become liable to pay the debts of the company in the character of contributories.

Reference was made to sect. 25 of the *Companies Act*, 1867, the application of which to this case I cannot see. It may have some—

(1) Law Rep. 3 Eq. 361.

(2) 2 D. J. & S. 101. *John 25246*

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thing to do with the original transaction between *Thomas Richardson* and the company, but to the case before me it has not the most remote application. What the liquidator has done, no doubt in the discharge, and perhaps in the zealous discharge, of his duty, it is not for me to censure further than to say that he has acted totally in error. He has attempted to make persons take the character of shareholders who were not, and who never held themselves out to be, shareholders, and never took upon themselves, either in name or in effect, the liability of shareholders. I am, therefore, of opinion that the names which have been so inserted must now be removed from the list of shareholders and contributories, with costs. With respect to Mr. *Fletcher*, he has attended here quite justifiably. If the claim of the liquidator had succeeded there would have been a right to prove for the amount of the claim that was made in the bankruptcy which Mr. *Fletcher* represents, and, therefore, it was his duty to come here. He was under no obligation to join himself with somebody else who might conduct the case in whatever way he thought fit, and perhaps not to his satisfaction. He was entitled to appear upon this motion, and is entitled, therefore, to have his costs.

Solicitors: *Shum, Crossman, & Crossman*, agent for *Turnbull & Tilley, West Hartlepool*; *Lewis, Munns, & Longden*; *R. T. Jarvis*, agent for *Hutchinson & Lucas, Darlington*.

LORD MANNERS *v.* JOHNSON.

[1874 M. 182.]

V.-C. H.

1875

Dec. 15.

*Covenant not to erect "Building"—Erection of Bay Window—Breach of Covenant—Damage—Interference with Privacy—Injury to Property—Right to sue.*

13th D 32  
19th D 26  
24th D 18

The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mortgagees in fee in possession of the estate, their heirs and assigns, not to erect any "building" on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, and about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, and carried from the foundation up to the roof.

Upon bill for injunction filed by the transferee from the mortgagees, and by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—

*Held*, first, that the bay windows were "buildings" within the meaning of the covenant, and the erection of them a violation of it; secondly, that there being a clear breach of covenant, the covenantees were entitled to their injunction without the necessity of shewing damage; thirdly, that invasion of privacy constituted damage; fourthly, that the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy; and, fifthly, that both the Plaintiffs had material interests sufficient to support the suit.

AT the date of the agreements and conveyances hereinafter mentioned, *J. H. Mannors Sutton* and *J. E. B. Dashwood* were mortgagees in fee in possession of lands of considerable extent in the parish of *Streatham*, known as the *Roupell Park Estate*, the equity of redemption in which was vested in *Richard Roupell*. The estate had been laid out for building purposes according to a regular scheme; and upon a part of it, known as *Palace Road*, five houses, Nos. 3 to 8, *Palace Road*, had been built in a line with and at a distance of about forty feet from one another, the fronts of which houses were at a distance of about eighty feet from *Palace Road*, from which they were each separated by a wall having entrance and exit gates for carriages, inside which wall was a front garden and carriage drive to the house door; and each house and garden was divided from the other by garden



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walls about eight feet in height. The houses were worth £4000 to £6000 a-piece.

By an agreement in writing, dated the 29th of April, 1873, and made between Messrs. *Manners Sutton* and *Dashwood* of the first part, Mr. *Richard Roupell* of the second part, and the Defendant of the third part, the Defendant agreed to purchase a piece of land in *Palace Road* (upon the site of which he afterwards built Nos. 1 and 2, *Palace Road*), and by the 15th clause of the agreement it was provided that he should not erect "any building" thereon "nearer to the said *Palace Road* than the line of frontage of the then present houses in *Palace Road*," but should "observe a straight line of frontage with the line of houses Nos. 3 to 8, *Palace Road*, aforesaid."

By a similar agreement, dated the 18th of June, 1873, the Plaintiff, Mr. *B. B. Baker*, agreed to purchase a piece of land in *Palace Road*, next to the Defendant's plot, with the messuage erected thereon, and known as No. 3, *Palace Road*, subject to a similar provision as to building; and upon the treaty for his purchase it was agreed between him and the mortgagees and mortgagor that he should have and be entitled to the benefit of the agreement with the Defendant by the 15th clause of his agreement.

By an indenture, dated the 31st of July, 1873, and made between the same persons as were parties to the agreement of the 29th of April, the premises Nos. 1 and 2, *Palace Road*, were conveyed to the Defendant in fee, and the Defendant entered into a covenant with Messrs. *Manners Sutton* and *Dashwood*, their heirs and assigns, precisely similar in terms to the 15th clause of his agreement.

By an indenture, dated the 26th of September, 1873, the premises No. 3, *Palace Road*, were similarly conveyed to the Plaintiff *Baker* in fee.

By an indenture, dated the 9th of February, 1874, Messrs. *Manners Sutton* and *Dashwood* transferred to the Plaintiff Lord *Manners* their mortgage debts and securities on the *Roupell Park* estate, and conveyed to him in fee the said estate, subject to the equity of redemption subsisting therein.

The Defendant took possession of his piece of ground and erected

two houses thereon, the general line of which was nearer to *Palace Road* than the line of the existing houses therein, by a distance variously stated as from five inches to one foot. These houses were, moreover, built with bay windows, projecting about three feet further towards the road, which bays were, on one side of the door in each house, carried from the foundation up to the roof. Lord *Manners* and Mr. *B. B. Baker* conceived this mode of building to be a breach of the Defendant's covenant, and after some correspondence they filed the present bill against the Defendant, and prayed for a declaration that the buildings and houses being erected by the Defendant constituted a breach of the covenant entered into by him in the indenture of the 31st of July, 1873, and for an injunction to restrain him from further proceeding with the erection of the buildings or houses erected or commenced to be erected by him, and from erecting, or permitting to continue on his premises, any building nearer to *Palace Road* than the line of frontage of the houses which existed at the date of his conveyance, and from not observing the straight line of frontage with the line of houses Nos. 3 to 8, *Palace Road*.

In September, 1874, the Plaintiffs moved for an injunction in the terms of the prayer of their bill, and the motion was ordered to stand to the hearing of the cause, the Defendant undertaking to abide by any order the Court might make at the hearing as to pulling down his buildings.

The cause now came on for hearing, and there was a considerable amount of evidence by scientific and other witnesses on either side.

*Dickinson*, Q.C., and *T. Northmore Lawrence*, for the Plaintiffs:—

The Defendant has committed a breach of his covenant in two respects.

First, in advancing the general line of his building a distance variously estimated at from five inches to one foot nearer to *Palace Road*.

Secondly, and this is the main ground of complaint, in constructing bay windows, which form part of the main structure of the houses, and project three feet further towards *Palace Road*, from which windows the premises of Mr. *Baker* are overlooked, to the destruction of the privacy of his front garden.

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In *Simpson v. Smith* (1), where the question was as to whether the certificate of the superintending architect was conclusive evidence that a particular building was beyond the general line, the erection in question was a bay window, and it was assumed to be a "building;" and there can be no doubt that, at all events, bay windows such as these, which are carried up from the foundation to the roof, are "buildings" within the meaning of the covenant.

In *Western v. Macdermott* (2) the Master of the Rolls granted an injunction to restrain a Defendant from erecting a bow of the depth of eight feet at the rear of his house, as in breach of a covenant not to "build" running with the land. There being, then, a clear breach of the covenant, it is not necessary for the parties entitled to the benefit of the covenant to shew that they have sustained substantial injury from the breach: *Tipping v. Eckersley* (3); *Western v. Macdermott* (4); *Leech v. Schweder* (5).

In this case, however, there is substantial injury by a destruction of privacy, which would lessen the letting or selling value of the property. No defence of delay is available to the Defendant in this case, as he had notice of the Plaintiffs' right to prevent his building, and of their intention to enforce it: *Coles v. Sims* (6).

*Cookson, Q.C., and W. W. Karlake, for the Defendants:—*

The object of covenants such as these is to secure substantial uniformity, and to prevent caprice in building upon estates laid out in accordance with a general scheme. But no building scheme could be considered as broken up by so paltry a deviation from the general line as this; and it would be intolerable if building upon a particular site could be stopped because an advance of a few inches has been made in the line of a house forty feet apart from the next house. Then as to the bay windows, they are mere projections of the same character as porticos or verandahs, which do not form the main line of the building, and are not within the meaning of the covenant.

*Simpson v. Smith* was merely an affirmation of *Tear v. Free-*

(1) Law Rep. 6 C. P. 87.

(2) Ibid. 1 Eq. 499. *38 Bean 243*

(3) 2 K. & J. 264.

(4) Law Rep. 2 Ch. 72.

(5) Ibid. 9 Ch. 463.

(6) 5 D. M. & G. 1.

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body (1), a case upon the special language of the *Metropolitan Building Act*; and it is to be observed that the later of those Acts altered the word describing the line of building to be observed from "regular" into "general." It cannot be said that where there is a breach of contract no damage at all need be shewn; otherwise, the Court might be called upon to interfere from mere jealousy on the part of a Plaintiff. There is here no real breach of uniformity, and not even nominal injury is shewn to either of these Plaintiffs. As to the mortgagee, the improvements have made his property more valuable; and as to the other Plaintiff, the Court will not import the preservation of privacy into a covenant which does not expressly extend to it. There is no sufficient interest in either of the Plaintiffs to support this suit; and, moreover, they have come too late to assert their rights, if they had any.

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HALL, V.C., after inquiring of Mr. *Dickinson* whether he pressed the first part of the case as to the advance of the line of the main building, and receiving an answer in the negative, said in that case he should not call for a reply, and continued:—

This suit embraces two distinct objects: the one to restrain the Defendant from encroaching and bringing forward the general front of the two houses in question; and the other to restrain him from allowing the bay windows in these houses to remain. I shall deal first with the latter object.

Now, that question depends entirely upon the construction of a covenant contained in the deed of the 31st of July, 1873. It has been said that the construction of that covenant is or may be affected by the cases of *Tear v. Freebody* and *Simpson v. Smith* (2); but I do not see that those authorities have any bearing upon the present case; for they dealt with the particular terms of an Act of Parliament containing expressions materially varying from the terms of the covenant upon which the question in the present case turns, and accordingly they do not seem to me to assist the Court in interpreting this deed, which must be considered according to the terms of the covenant contained in it.

What, then, is the true construction of that covenant? The

(1) 4 C. B. (N.S.) 228, 262.

(2) Law Rep. 6 C. P. 87.



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covenant is a covenant by the Defendant that he will not "erect any building on the said premises Nos. 1 and 2, *Palace Road*" (that is, upon the two sites), "nearer to the said *Palace Road* than the line of frontage of the present houses in *Palace Road*." And then it goes on, "but shall observe a straight line of frontage with the line of houses Nos. 3 to 8, *Palace Road*, aforesaid." As I read that, there is a positive obligation on the Defendant not to erect any buildings on the two sites nearer to *Palace Road* than the line of frontage of the houses in *Palace Road*, which is not in any way qualified or detracted from by the following words, "but shall observe a straight line of frontage with the line of the existing houses." I consider it is an independent covenant in its first part, not in any way restricted or cut down to mean merely that he will observe in his buildings "a straight line of frontage with the line of houses." But if it be not a separate obligation, reading the whole of the obligation, and treating it for this purpose as if it were all to be taken together, then it appears to me there is a plain obligation in that clause that there shall be no buildings on those two sites "nearer to the said *Palace Road* than the line of frontage of the present houses in *Palace Road*."

If that be the true construction, the next question is whether these bays are in fact buildings within the meaning of that covenant; and it is said that they are not buildings but projections, just as a portico or a verandah is a projection.

I should have thought we did not want surveyors' certificates or scientific witnesses to expound the meaning of that word "building" as contained in that covenant. When you find that parts of the main structure of the house (*i.e.*, the portions of the house forming the bays) are carried up from the foundation, it appears to me clear that such parts are buildings within the meaning of the covenant. Although the Defendant has not in fact, on one side of the house, done more than put a bow on one floor, yet if his contention is right, he is entitled to carry the bow of this house up to the top. This I refer to as testing whether the additions to the main building can be considered as not within the covenant. If he could do that, I do not see why he should not have bows over the portico, and by degrees extend the whole frontage.

It is not necessary for me to say anything as to whether a mere

projection as distinguished from a portion of the main building would be within the covenant.

No authority has been cited (if any such there could be) to shew that my interpretation of the word "building" in such an instrument or covenant is not a proper one. The only case that has been referred to bearing at all upon the question is *Western v. Macdermott* (1). In that case the bay or bow was considered part of the building, and a violation of the covenant not to build, and on that the injunction was granted, and on appeal affirmed. In this case the balance of evidence leaves no doubt that, in accordance with my view of the ordinary acceptance and meaning of the words, these bows are parts of the building.

There is therefore, in my opinion, a violation of the covenant. But then it is said, if that be so, still it is not a case in which the Court should interfere, for it is contended that this bill comes too late for this Court to interfere. I think that is not so. There was distinct notice given and persisted in from beginning to end, by reason of which the Defendant must be taken to have done everything at his own peril, even to the extent of the Court interfering by mandatory injunction.

Then it is said it is not a case for a mandatory injunction, because, although the covenant may be such as I have held it to be, not only is the amount of damage and injury *nil*, but more than that, what has been done is actually an improvement to the Plaintiff's property. Of course the Plaintiff is the best judge of what will be an improvement to his own property; but I take it now to be the law that if a covenant of this character is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building upon property, then the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether any, and if any, what injury or damage is consequent on the breach of the covenant, and that an assign of the benefit of the covenant is in as good a position as the original covenantee. One of the earliest cases in which this doctrine is distinctly stated was the case of *Kemp v. Sober* (2). In that case Lord *Cranworth* (3) expresses himself

(1) Law Rep. 1 Eq. 499.

(2) 1 Sim. (N.S.) 517.

(3) 1 Sim. (N.S.) 520.

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thus: "It was said that this case comes within the principle of those cases in which the Court has refused to interfere because no damage has been actually sustained; but a person who stipulates that her neighbour shall not keep a school, stipulates that she shall be relieved from all anxiety arising from a school being kept, and the feeling of anxiety is damage."

Then there is the case of *Tipping v. Eckersley* (1), where Vice-Chancellor *Wood* laid down the rule thus: "If the construction of the instrument be clear, and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the Court to interfere by injunction. And I apprehend the Court may so interfere whether the Defendant has or has not actually committed the breach in respect of which the interference of the Court is sought. For in a case of contract it is enough if the Defendant claims and insists on a right to do the act, although he has not already done it, *modo et formâ*, as alleged. In such a case I should have no difficulty in granting an injunction."

Then Lord *Romilly*, having made observations on that head in *Western v. Macdermott* (2), Lord *Chelmsford*, when the case went before him on appeal, shewed he did not acquiesce in the view taken by Lord *Romilly*. Then we have the whole subject reviewed and considered by the present Master of the Rolls in the case of *Leech v. Schweder* (3), where he went through all the authorities, referring to a very clear expression of the same view by the late Master of the Rolls, Lord *Romilly*, in the case of *Dickinson v. Grand Junction Canal Company* (4). I think, therefore, that the law is as I have laid it down.

But if it had been necessary for me, in determining this case, to rest my judgment upon the question whether or not there was damage to the Plaintiffs arising from the erection of these windows, I should, upon the balance of evidence, come to the conclusion that there was. It is then said that these houses are more ornamental than the others. However that may be, I think, being partially overlooked from the first-floor rooms even at such a distance, particularly with reference to the house No. 2, is

(1) 2 K. & J. 264, 270.

(3) Law Rep. 9 Ch. 465, n.

(2) Law Rep. 1 Eq. 499.

(4) 15 Beav. 260.

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enough materially to detract from the value of the Plaintiff's house. It is said that there is no covenant as to privacy ; but privacy will be interfered with, and there is a covenant that the act shall not be done the doing of which causes the invasion of privacy, and there is accordingly damage and injury in respect of which relief ought to be granted.

Now as to the right of the Plaintiffs to sue. It has been said this is the suit of Mr. *Baker*, and that Lord *Manners* had no interest whatever in it. The position of the parties I conceive to be this: Lord *Manners*, or his predecessors as mortgagees, were covenantees, and the covenants were entered into with them, their heirs and assigns. Under the circumstances of the case Mr. *Baker* is an assign of the covenants, as far as regards the property which he acquired from the persons who sold to him. The covenants in respect of the property retained by the original covenantees passed along with the property so retained to Lord *Manners*, the other Plaintiff. Although Lord *Manners* may be merely a mortgagee, yet I cannot assume that it is a matter of no importance to him to have the covenant performed. I do not know the extent or value of the security, or if there is anything belonging to the mortgagor after his mortgage is paid. But he is covenantee ; and something was said about his having entered into covenants with the purchasers from him, and that he would enforce those covenants. I do not know how that was. But whether that was so or not, he being a covenantee he would be reasonably and properly willing to concur in any proceedings taken to enforce those covenants and protect persons for whose common benefit those covenants were obtained. So that I consider both parties have a substantial and material interest. It is not very material whether they have or not, for if one has an interest, that is sufficient to maintain the suit.

I see no reason why the Court should not exercise its jurisdiction by a mandatory injunction as to the bow windows. I cannot listen to suggestions of hardships and loss of value, and so forth. The Defendant, by cutting off the bow windows, will have to make every one of his rooms that has a bow window smaller. But he must take the consequences of that.

The next and only remaining question is that as to the advance of the main building, which I could not determine, in the present

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state of the evidence, without sending a surveyor to examine and report and take the measurements. That part of the case the Plaintiffs very reasonably and properly have not desired to press, and it therefore becomes only material with reference to the costs of the litigation. Instead, therefore, of incurring the expense of a surveyor's report, I shall not give the Plaintiffs any costs of their cross-examination of witnesses, a considerable portion of which was directed to that part of the case; but, with that exception, while granting them a mandatory injunction, I shall give them the costs of the suit.

Solicitors: *H. Cowlard; A. Beddall.*

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HOLMES v. NEWCASTLE-UPON-TYNE FREEHOLD  
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[1874 H. 38.]

*Limited Company—Sale of Lands of—Division of Proceeds—Reduction of Capital.*

1064D155  
1064D253 361  
368  
1064D614

The Plaintiff and nine other persons formed themselves into a limited company, under the *Companies Acts*, 1862 and 1867, and executed articles of association which empowered the directors, on behalf of the company, to buy and also to sell land, but which contained no regulation authorizing a reduction of capital. At the time of the registration of the company the ten shareholders were the co-owners of lands which they had purchased with moneys subscribed by themselves in equal shares, and after the registration they conveyed these lands to themselves on behalf of the company. There was no other paid-up capital of the company except the lands so conveyed, and certain moneys expended on the improvement thereof, which had also been subscribed by the shareholders in equal shares. The directors afterwards sold a portion of these lands, which they alleged was not required for the purposes of the company, and divided the proceeds among the shareholders in equal shares, paying to nine of the shareholders the amount of their shares therein. The Plaintiff refused to receive his share, and filed his bill against the company and the nine other shareholders:—

*Held*, that the division of the purchase-money among the shareholders was *ultra vires* and invalid; and that the nine shareholders must pay back to the company the amounts which they had respectively received.

THE *Newcastle-upon-Tyne Freehold Abattoir Company, Limited*, was, on the 18th of February, 1870, registered under the *Companies Acts*, 1862 and 1867, with limited liability, and with a

nominal capital of £5000 divided into fifty shares of £100. The company was promoted by the Plaintiff and nine other persons, nearly all of whom were butchers by trade, who all signed the memorandum of association, and were the only shareholders in the company, and each held the same number of shares. The objects of the company, as defined by the memorandum, were to carry on the trade or business of slaughtering cattle, and to purchase, exchange, lease, occupy, or acquire lands, with power to build slaughterhouses on or otherwise improve, and to let, sell, or otherwise deal with, the lands and buildings acquired by the company. The articles of association provided that the directors might, without further authority from the members, in the name and on behalf of the company, acquire by purchase, exchange, or lease, property authorized by the memorandum or articles to be acquired by the company, and pay for the acquisition of such property either in cash or shares to be treated as either wholly or in part paid up, or in such other manner as the directors might deem expedient; and that they might manage, sell, or otherwise deal with and dispose of, in such manner and upon such terms and conditions as they thought fit, any of the property of the company, and might accept payment therefor in such manner as they deemed expedient.

Neither the memorandum nor the articles of association contained any regulation authorizing or enabling the company to effect any reduction of its capital.

Shortly before, and with a view to the formation of the company, the Plaintiff and the nine other original members of it, purchased in their joint names, and by means of money contributed by them in equal shares, certain freehold lands and buildings of the aggregate value of £2870. Before the formation of the company the Plaintiff and his nine co-owners sold a portion of the property they had thus purchased to one *Gillie* for £900, and divided the purchase-money equally between themselves; and after the registration of the company, by deed dated the 13th of May, 1870, they conveyed the residue of the property to themselves on behalf of the company. No calls were ever made upon the shares, and there was no other paid-up capital except the property so conveyed to the company, and certain moneys expended in building

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thereon, amounting to £1612 5s. 4d., which had been contributed by the shareholders in equal shares.

The directors afterwards, in July, 1872, sold for £1000 a portion of the property thus conveyed to the company, which, in their opinion, was not required for the purposes of the company, and divided the purchase-moneys equally among the shareholders, paying to all, except the Plaintiff, £100 each as their respective shares. The Plaintiff, however, declined to receive his £100, on the ground that the £1000 formed part of the capital of the company, and was not properly divisible among the shareholders, and he accordingly filed the present bill against the company and the other nine shareholders, and prayed for a declaration that the purchase-money of £1000 so received by the directors formed part of the capital of the company, and that the division of it among the shareholders was *ultra vires* and invalid, and that it ought to be refunded to the company; and for an order that the Defendants, other than the company, might repay to the company so much of the £1000 as they had respectively received.

Two of the Defendants, *Sharp* and wife, by their answer, stated that they were dissatisfied with the sale, but had no idea that, as they had since been advised, the distribution of the proceeds was illegal, and they submitted to repay the amount of their share, and supported the Plaintiff's case.

*Karslake*, Q.C., and *W. Barber*, for the Plaintiff:—

The sale of this portion of the company's property, and the distribution of the proceeds amongst the shareholders, is in point of fact a reduction of the capital of the company, unauthorized by its memorandum or articles of association, and effected without any special resolution, and without the formalities prescribed by the 9th and following sections of the *Companies Act*, 1867. It cannot, therefore, be supported as against dissentient shareholders or outside creditors.

*Dickinson*, Q.C., and *Henderson*, for the Defendants Mr. and Mrs. *Sharp*.

*Morgan*, Q.C., and *G. Williamson*, for the other Defendants:—

This is not, as has been contended, a case of reduction of capital

within the meaning of the 9th section of the *Companies Act*, 1867. It is a case in which these ten co-owners have, with money supplied by themselves in equal shares, bought for the purposes of the company something which has turned out not to be wanted for those purposes. What were they to do with it? They could not keep it, for it would be a dead weight upon the company. If this had been the case of an ordinary partnership, it would have been judicious and proper to have sold this property and to have paid back the proceeds to those who had subscribed to buy it, and it is not less so in the present case. What has been done here cannot be put higher than as a payment of dividends otherwise than out of profits, and this company not being governed by Table A. of the Act of 1862, or within the *Companies Clauses Consolidation Act*, 1845, such a payment is not expressly prohibited, so as to be restrainable by injunction; and, consequently, such authorities as *Hoole v. Great Western Railway Company* (1) and *Bloxam v. Metropolitan Railway Company* (2) do not apply: *Lindley on Partnership* (3). Moreover, the 121st section of the *Companies Clauses Act*, 1845, in enacting that the company shall not make any dividend out of capital, provides that the word "dividend" shall not be considered to apply to a return of any portion of the capital stock with the consent of the mortgagees and bond creditors. We admit that, as against creditors, the shares cannot be treated as paid up to the extent of the money which is repaid to the shareholders; but this is merely a question concerning shareholders *inter se*. If this had been money called up and not wanted, surely it might have been paid back—of course deducting the amount paid back from the amount to be treated as paid up on each share; and what has been here done is exactly analogous. There has been no money call. Property has been purchased, and the shareholders who purchased it have found the money out of their own pockets, and no one can be prejudiced by their being repaid the money which is the value of the excess of what was purchased over what was actually wanted, and which in reality has never become the property of the company. Moreover, the Plaintiff knew what was being done as far back as August, 1872, and he did not apply

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(1) Law Rep. 3 Ch. 262.

(2) Law Rep. 3 Ch. 337.

(3) 3rd Ed. p. 814.



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for an injunction to stop it, and in fact did nothing until February, 1874. He cannot now have the assistance of the Court to undo what was done with his knowledge, and to compel the other shareholders to refund moneys which they may have spent. Upon this part of the case, *Burt v. British Nation Life Assurance Association* (1) and *Matthews v. Great Northern Railway Company* (2) are exactly in point.

HALL, V.C. :—

It appears to me that the Plaintiff's case is correct. It has been very ably argued by Mr. *Morgan*, with a view to relieve his clients from the responsibility which I consider they undertook when they received back the several sums of £100 each. The partnership which was formed between these parties was regulated by a deed which does not contain any provision as to reduction of capital, and it is said that the transaction which is impeached by this bill was, in fact, a reduction of capital. It has been contended, on the other hand, that, there being no clause as to reduction of capital in the articles of association, and this company not being regulated by the form given in Table A., which contains special provisions prohibiting the payment of dividends out of capital, there is, therefore, nothing which prohibits what has been done in this case. I do not think that that view is correct, although I think that, dealing with this case quite independently of the argument that it is a case of what is called a reduction of capital, a different result would not be arrived at. But, as regards the contention that what has been done here was not, in fact, prohibited by the articles of association, I conceive that the true effect of these articles is, without any express provision to that effect, to render it illegal, this being a limited company, to do what amounts to a reduction of capital.

The question seems to have been considered in a case of the *Droitwich Patent Salt Company v. Curzon* (3). That was a case of a company which was formed long before the passing of the *Companies Act*, 1862, but was subsequently registered under that

(1) 4 De G. & J. 158. *Spence* 48. 612 (2) 28 L. J. (Ch.) 375. *Spence* 48. 612  
(3) Law Rep. 3 Ex. 35.

Act, and the deed of settlement of the company, which was registered as their articles of association, contained express provisions for a reduction of capital. After the company had been registered under the Act of 1862, they, acting under those provisions in their deed of association, proceeded to reduce their capital, and the question then arose whether they could do so. It was decided that they could not. The Court of Exchequer said that it was illegal; holding that they had given up the clauses as to reduction of capital in their deed of association by the very fact of their being registered under the Act of 1862; and that from thenceforth they were bound by the registration of their company as a company with a certain capital divided into so many shares, and that so it must remain; for the means of effecting a reduction of capital through the process provided by the subsequent Act of 1867 did not then exist. The Court of Exchequer considered it quite clear that the company there had no right to reduce its capital.

But suppose this case be viewed as an ordinary case of partners not carrying on business under the provisions of the Act of 1862. The partnership contract is that the partners shall purchase certain property, which shall constitute the property of the partners and shall be used for the partnership purposes. By their partnership contract the partners have powers of selling and disposing of the property, but there is no provision that when they do so they shall divide the money between them; for the effect of that might be that if the board of directors thought proper to sell the whole of the property under their powers of sale they might divide the purchase-money, and immediately bring the company to nothing at all. That is not the partnership contract. It is said again that the property in question not being required for the purposes of the partnership, and there being no provision on the subject in the partnership deed, it was, under such circumstances, a reasonable and right thing to divide the money amongst the partners. I cannot take that view; it should have been retained in hand. Dealing with the case irrespective of the Act of 1862, if under an ordinary power to sell partnership property of this description the partners have got a fund in hand, they must retain it in hand as partnership capital

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and for the purposes of the partnership, and not divide it and take it out of the partnership unless they can all arrange among themselves that it shall be taken out.

Then, viewed with reference to the Act, it is to my mind perfectly monstrous to suppose that a company, putting itself forward as a company with a capital of a certain amount, in this case admitted to consist simply and solely of so much property which represents the £5000 capital divided into shares, could, immediately after commencing business under this memorandum of association, have sold three-quarters or a larger proportion of this property, on the purchase and improvement of which they had absorbed all their capital, and then said, "Now, we have nothing more to call up." If they were entitled to do this, creditors and people who had trusted them on the faith of their memorandum of association, and of there being £5000 either to be called up or represented by property which had been acquired through the means of capital found, would be entirely deceived. It is not denied in this case that the creditors of this company, if it should ever come to be wound up (and we must consider that, however solvent it may now be, it may one day be wound up), would then be entitled to say that this division of a portion of the capital was clearly not good against them, and that it must be repaid.

But who are to repay it? Are the persons who received it to repay it, or is the transaction to be moulded in some way or another, so that a certain amount of calls representing the sum divided shall be treated as unpaid, and the purchasers of the shares in the company shall be treated afterwards as buying and taking those shares subject to that liability? What a confusion would exist. Of course the purchasers of these shares hereafter would say: "We knew nothing whatever of this division of part of the capital. Our shares were fully paid up, and we are subject to no liability whatever." The only way, therefore, in which the public can be protected with reference to this transaction is by having that money restored; and it was, I consider, the duty of the Plaintiff, holding the position of a shareholder in this company, to see, on behalf of the creditors, present and future, that the money was brought back. That goes a long way towards shewing that the real defence in this case, viz., that of acquiescence, can

have no foundation whatever. The Plaintiff was certainly not a consenting party to the division of this money; and I do not consider that he was a consenting party to the sale, for if any communication may be taken to have been made to him with reference to the intended sale, he seems rather to have considered that the price offered was not sufficient. But it is not the sale, but the division of the money, which is in question; and to that, upon the evidence, he did not consent, nor has he in any way, expressly or otherwise, sanctioned the transaction. Therefore the mere question is, whether, by his delay in taking this proceeding, he is precluded from now complaining of the transaction which the Defendants knew he disapproved of and would not affirm.

I consider his conduct has not deprived him of that right. This is a case where, fortunately, from the small number of shareholders in the company, we are not embarrassed with any difficulty by reason of new parties having become shareholders in the company since the transaction took place. We have before the Court the persons, and the only persons, who took part in the transaction, and received the money. They received it knowing it ought to be returned, and if they have transferred shares from one to another since the transaction took place, they transferred them perfectly well knowing that the transaction might be questioned. And so far as regards the shares, the persons who bought them have apparently got a benefit, because they would have to pay less for their shares than they would otherwise have to do, seeing that a certain portion of the capital had been returned to the persons from whom they were buying those shares. So they suffered no loss whatever. The loss must fall upon the right shoulders, that is to say, upon the persons who actually received the money. We have them before the Court. They must each of them, including Mr. and Mrs. *Sharp*, return to the company the sum which they have received. Nobody, as I understand, appears separately for the company.

There will accordingly be a declaration that the £1000 formed part of the capital of the company, and that the division of it amongst the shareholders was *ultra vires* and invalid, and that it ought to be returned to the company; with an order that the Defendants, other than the company, do repay to the company

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within a month the moneys received by them respectively. The Defendants, other than Mr. and Mrs. *Sharp*, must pay the Plaintiff's costs, and Mr. and Mrs. *Sharp* must pay their own.

Solicitors: *G. C. Rice*, agent for *Keenlyside, Forster, & Winship*, Newcastle; *Williamson, Hill, & Co.*, agents for *Ingledeu & Daggett*, Newcastle.

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COLEBOURNE v. COLEBOURNE.

[1876 C. 8.]

*Practice—Judicature Act, 1873, s. 25, sub-s. 8—Rules of Court, 1875, Order III., r. 2—Indorsement of Writ—Amendment of—Injunction—Receiver.*

A Plaintiff should indorse his writ with a claim for an injunction or receiver when the obtaining of either is a substantial object of his action.

IN this case a brother and sister were entitled under a will to personal estate in moieties; the brother, who was sole executor, had advertised a large part of the assets for sale, and had, it was alleged, expressed an intention shortly to leave the country. Under these circumstances, the sister commenced an action for administration, and had indorsed her writ with a claim for administration only.

*Oswald*, for the Plaintiff, now moved *ex parte* before service, upon the authority of *In re H.'s Estate* (1), for the appointment of a receiver by name. He submitted that the Court had full jurisdiction to make the order under the *Judicature Act, 1873, s. 25, sub-s. 8*, although the writ had not been indorsed with a claim for an injunction or receiver. But, if the Court thought otherwise, he asked leave, under the *Rules of Court, 1875, Order III., rule 2*, to amend the indorsement. It was at least doubtful whether the special indorsement was requisite. He referred to *Wilson's Judicature Acts* (2).

HALL, V.C. :—

The Plaintiff had better amend her indorsement by asking for an injunction to restrain the Defendant from receiving the pro-

(1) *Ante*, p. 276.

(2) 1st Ed. pp. 64, 158, 159, 165.

ceeds of the sale of the property he has advertised for sale, and for a receiver; and upon that amendment I will grant an interim injunction against the Defendant. The Plaintiff should also cause an intimation to be made to the auctioneer that he is not to part with the money. Notice of motion against the Defendant may be given for Thursday next.

Solicitors: *Cowdell, Grundy, & Browne.*

### COOPER v. BLISSETT.

[1875 C. 87a.]

*Practice—Judicature Acts—Administration of Real and Personal Estate—Creditor's Action for—Action by single Creditor—Indorsement of Writ—Rules of Court, 1875, Order XVI., r. 9—Appendix A., Part 2, s. 1.*

A single creditor can have administration of the real and personal estate of his deceased debtor without suing on behalf of "all other the creditors," and he should indorse his writ with a claim as a creditor simply.

THIS was a creditor's action against the administratrix and heiress-at-law for administration of the real and personal estate of an intestate. The creditor did not sue on behalf of himself "and all other the creditors," but indorsed his writ according to the first form of the general indorsements in Appendix A. to the *Judicature Act, 1875*, part 2, s. 1, with a claim "a creditor" simply. Minutes of the usual order had been agreed upon.

*Grosvenor Woods*, for the Plaintiff:—

Under the old practice a creditor sued for administration of the real and personal estate of his debtor "on behalf of himself and all the other creditors;" and where he has purported to sue on his own behalf alone, the bill has been taken as a bill on behalf of all the creditors: *Woods v. Sowerby* (1). This is apparently no longer the practice; but if the Court considers that under the new practice a creditor should indorse his writ with a claim on behalf of all the creditors, I ask for leave to amend accordingly.

*Seeley*, for the Defendant.

(1) 14 W. R. 9.

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The late Lord Justice *Giffard*, when Vice Chancellor, said, in *Wooldridge v. Norris* (1), that he should not in any case allow the objection that the bill was not expressed to have been filed on behalf of the Plaintiff and all the other creditors of the testator to prevail, because, whether the bill be or be not in terms filed on behalf of all the creditors, the decree is in the same form. This seems to me to be a reasonable view, and I shall not require an amendment of the indorsement on the writ.

Solicitors: *E. W. Owles; Paterson, Sons, & Garner.*

V.-C. H.

BENNETT v. MOORE.

1876  
 Jan. 20.

[1875 B. 114.]

*Practice—Judicature Acts—Rules of Court, 1875, Order XL., r. 11—Admissions in Pleadings—Order on Motion—Further Hearing.*

Form of order made on motion for judgment under Order XL., rule 11, when the further hearing of the action is adjourned.

IN this suit, which was commenced under the old practice, the Plaintiff had, upon admissions of fact in the answers, moved under the Rules of Court, 1875, Order XL., rule 11, and obtained an order amounting to a full decree for execution of the trusts of a settlement, with inquiries as to parties and accounts, and an order that a defaulting trustee should pay money into Court; and the order as proposed to be drawn up reserved further consideration.

The Registrar, however, objected that further consideration could not be reserved on the hearing of a motion.

*Bevir*, for the Plaintiff, now applied on behalf of all parties for the direction of the Court, and stated that the Master of the Rolls, in the case of *Lendram v. Rooke* (January 19th, 1876), had made an order upon a similar motion, in which his Lordship had ordered further consideration to be adjourned, adding the words, the Court "not requiring any further hearing of the cause."

(1) Law Rep. 6 Eq. 410, 414.

*Form of order followed in Giffard's Smith*  
*2CLD 686-CLR.*

HALL, V.C.:—

You may take the order in the same form as that of the Master of the Rolls in *Lendram v. Rooke*.

The order was ultimately made in the ordinary form, with the addition of the words, “and without requiring any further prior hearing than this motion of the said cause, the further hearing of the said cause is adjourned.”

Solicitors: *Coode, Kingdon, & Cotton*.

V.-C. H.

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v.

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## GREEN v. COLEBY.

[1875 G. 22a.]

V.-C. H.

1876

Jan. 22.

*Practice—Judicature Acts—Action for Administration of Real and Personal Estate—Action heard as Short Cause—Statement of Claim.*

Where an action by *cestuis que trust* under a will against executors and devisees in trust, for administration of the real and personal estate of the testator, was to be heard as a short cause, the Court considered it unnecessary for the Plaintiff to deliver a statement of claim.

THIS was an action by *cestuis que trust* under a will for the administration of the real and personal estate of the testator. The Plaintiffs issued their writ on the 27th of November, and on the 11th of December they, by a letter, requested the Defendants, who were the executors and devisees in trust of the testator, to consent to an immediate decree for administration in order to save the expense of a statement of claim.

The Defendants considered that the Plaintiff ought, in such an action, to deliver a statement of claim, and the Plaintiffs accordingly delivered their statement on the 24th of December.

The Defendants then delivered their statement of defence, in which they stated they were willing, subject to the sanction of the Court, to consent that the action should be tried as short, and the usual administration decree taken.

*Cozens-Hardy*, for the Plaintiffs:—

There is a conflict of authority as to whether any statement of



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 —

claim should be delivered when it is intended to hear an action "short." The Master of the Rolls has held that no statement should be delivered in such a case; but Vice-Chancellor *Malins* has considered that in such a suit as the present it is the proper course to deliver a statement of claim. //

*Alfred Smith*, for the Defendants.

HALL, V.C. :—

I do not consider that a statement of claim is necessary in such a case as the present.

Solicitors: *Hepburn & Son; Gardiner.*

(1) *See Balmie Coleby WM 16/75 255. Boys Cook WM 76*  
 28.

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 1876  
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 —

CONINGTON v. GILLIAT.

[1875 C. 212.]

*Practice—Judicature Acts—Trial—Question of Fact—One Counsel.*

One counsel only will be heard on each side upon the trial of a question of fact.

THIS was a suit, commenced by bill under the old practice, in which the Plaintiff, a lady, separated from her second husband, who had been adjudicated a bankrupt, and having children by her first, but none by her second marriage, sought to establish her equity to have settled, for the benefit of herself and her children by her first marriage, a fund to which she was entitled under the will of her aunt, subject to the life interest of a person who had recently died. The Plaintiff had given notice of trial under the new procedure, and the suit now came on accordingly, the Plaintiff having to establish her case by oral evidence in Court.

The case involved two questions of fact: first, whether the Plaintiff's second husband was of ability to maintain her; and, secondly, whether, if not, the Plaintiff had already a sufficient provision from other sources. It also involved two questions of law: first, whether, assuming the Plaintiff to be entitled to an equity to a settlement, the whole or only part of the fund ought, under the circumstances, to be settled; and, secondly, as to the form of

the settlement, whether the children by the Plaintiff's first marriage (who it was said were otherwise provided for) came within the equity, and could be included as beneficiaries under the proposed settlement.

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After *Hastings*, Q.C., had finished his address on the conclusion of the examination and cross-examination of the Plaintiff,

*Hadley*, with *Hastings*, Q.C., for the Plaintiff, was proceeding to address the Court, when

*W. Pearson*, Q.C. (with whom was *F. A. Lewin*), for Defendants claiming under an assignment of the fund made by the second husband before his bankruptcy, objected that a second counsel could not, according to the practice at common law, be heard on a question of fact.

*Hastings*, Q.C. :—

The Lord Chancellor, in an appeal from the Queen's Bench Division, *Sneesby v. Lancashire and Yorkshire Railway Company* (1), recently laid it down that the practice there must be assimilated to that of the Court of Chancery, and that two counsel could therefore be heard on each side.

*Aspinall*, for the trustees of the will under which the fund was derived.

*Charles Howard*, for the Plaintiff's second husband and his trustee in bankruptcy.

HALL, V.C. :—

In this case, if there are any questions of law they are so severed from the questions of fact, that it will be better to dispose of the questions of fact first; and upon the questions of fact I shall hear one counsel only. When the questions of fact are disposed of, the case will be discussed upon the questions of law, when it will be both reasonable and proper that two counsel should be heard.

Solicitors: *Norris, Allens, & Carter*; *S. A. Rice*; *D. Howell*; *Lewin & Co.*

V.-C. H.

## JENKINS v. DAVIES.

1876

[1875 J. 9.]

Jan. 27.

*Practice—Judicature Acts—Admissions in Pleadings—Motion for Judgment against one of two Defendants—Rules of Court, 1875, Order XIX., r. 17; Order XL., r. 11.*

2BD. 651,  
3BD. 171

A statement of defence was delivered in an action brought against a husband and wife upon a joint and several promissory note given by them, which, purporting to be the defence of both Defendants, raised no defence as regarded the husband:—

*Held*, upon motion for judgment, that the Plaintiffs were entitled under Order XL., rule 11, to final judgment against the husband without waiting for the determination of the case against the wife.

THIS was an action against a husband and wife upon a joint and several promissory note for £200, given by the Defendants.

In default of defence the Plaintiffs would have been entitled, under the Rules of Court, 1875, Order XXIX., rule 2, to enter final judgment, but a statement of defence had been delivered, which, purporting to be the defence of both husband and wife, raised no defence as regarded the husband.

*Hadley*, for the Plaintiffs, now moved for final judgment against the husband. Inasmuch as under Order XIX., rule 17, all allegations of fact in the Plaintiffs' pleadings, not denied by the Defendants, must be taken to be admitted, the Plaintiffs are entitled to final judgment under Order XL., rule 11, against the husband upon his admissions, without waiting for the determination of the case against the wife.

HALL, V.C. :—

That is so. The Plaintiff seems to be entitled to the order, and you may take it upon affidavit of service of the notice of motion.

Solicitor: I. H. Wrentmore.

*In re* SOUTHWOLD RAILWAY COMPANY'S BILL.*Ex parte* DEPOSITORS.

*Railway Parliamentary Deposit—Investment in India Stock—9 Vict. c. 20, s. 4—Lands Clauses Consolidation Act, 1845, s. 70.*

V.-C. H.

1876

Feb. 4.

Although *India Stock* is not one of the securities mentioned in the statute 9 Vict. c. 20, s. 4; or in the *Lands Clauses Consolidation Act, 1845, s. 70*, the Court will allow railway parliamentary deposits to be invested in that stock.

*In re Fryer's Settlement* (1) followed, and *Ex parte Great Northern Railway Company* (2) not followed.

THIS was a petition asking for a direction that the parliamentary deposit made in the matter of the *Southwold Railway Company's Bill* should be invested in *India Stock*.

*W. Renshaw*, for the Petitioners, referred to the statute 9 Vict. c. 20, s. 4, by the provisions of which the Court was empowered to order an investment in £3 per Cent. Consolidated, or £3 per Cent. Reduced Bank Annuities, or any Government security or securities, at the option of the Petitioners; and to the case of *Ex parte Great Northern Railway Company* (2), in which Lord Romilly declined to order an investment in any other than the securities specifically mentioned in that statute. He submitted that the words of the statute (9 Vict. c. 20, s. 4) were exactly like those used in the *Lands Clauses Consolidation Act, 1845, s. 70* (3), excepting as to the word "real" before securities; and that the case of *In re Fryer's Settlement* (1) was an authority for the present application.

HALL, V.C., made the order in the terms asked.

Solicitor: *W. H. Stephens*.

(1) *Law Rep.* 20 Eq. 468.

(2) *Law Rep.* 9 Eq. 274.

(3) *Morgan's Ch. Acts and Orders*, 3rd Ed. p. 33.

*18th Dec 1876*  
*20th Dec 1876*



C. J. B.

*Ex parte SAWYER. In re BOWDEN.*

1876

Jan. 17.

*Practice—Costs of Appeal—Shorthand Writer's Notes of Proceedings in Court below.*

The charge for a copy of a shorthand writer's notes of the proceedings in a County Court allowed as part of the costs of an appeal.

THIS was an application to review a taxation of costs made by the Taxing Master.

The creditors of *John Bowden*, a corn merchant at *Plymouth*, resolved that his affairs should be liquidated by arrangement. *Sawyer, Wallace, & Co.* proved against the estate for £3054 9s. 11d., and the Judge afterwards ordered their proof to be increased by the sum of £547 6s. From this order the trustees appealed. The appeal was heard by the Chief Judge on the 26th of July, 1875, and was dismissed with costs to be paid by the Appellants. The solicitor for *Sawyer & Co.* carried in his bill of costs for taxation. Among other items contained in it was a sum of £4 15s., which had been paid for an office copy of notes, which had been taken by a shorthand writer, of the proceedings on the hearing of the motion by the Judge of the County Court. These notes were taken by the special order of the Judge, and were filed with the proceedings. The Taxing Master disallowed this item, on the ground that it was not property chargeable in the matter of the appeal, but that, if chargeable at all, it formed part of the costs of the proceedings in the County Court. The Taxing Master also, for the same reason, disallowed a charge of £6 6s. 8d. for perusing the notes, and a charge of 6s. 8d. for bespeaking the copy. *Sawyer & Co.* now applied to have the taxation reviewed, and to have these three charges allowed.

*A. Beddall* (solicitor), for the application.

*Learoyd* (solicitor), *contra*.

BACON, C.J.:—

The taking of the shorthand notes, and the furnishing a transcript of them, involves a question of principle. The Judge of the

County Court delivered his judgment on the application made to him, and that could only be upon the evidence before him, whether it is recited in the order or not. There was also a transcript of the notes taken, and it is upon the file of the Court. When the case came before me on appeal it was necessary that I should be made acquainted with the proceedings in the Court below, and this could only be done by means of a copy of the shorthand writer's notes of those proceedings, for there was no other record of them. The employment of a shorthand writer is a matter entirely within the discretion of the Court. No objection was made in this Court to the reception of the notes; indeed, they are necessarily part of the file of proceedings. On principle, I think that the charge for making a transcript of the notes should have been allowed. The other charges involve no question of principle, but are entirely within the discretion of the Taxing Master, with the exercise of which the Court never interferes. But the sum actually paid for the copy of the notes must be allowed.

C. J. B.

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*Ex parte*  
SAWYER.*In re*  
BOWDEN.

Solicitors: *A. Beddall; Learoyd & Co.*

*Ex parte* DAY. *In re* DAY.

*Liquidation—Registration of Resolutions—Debt to illegal Association.*

C. J. B.

1876

Jan. 24.

In the statement of affairs of a debtor who had filed a liquidation petition, there was inserted a large debt due to an illegal association. At the first meeting of creditors a liquidation was resolved on:—

*Held* (reversing the decision of the County Court Judge), that the resolutions ought to be registered.

THIS was an appeal from a decision of the Judge of the *Sheffield* County Court.

*Francis Day*, an accountant, of *Sheffield*, filed a liquidation petition on the 18th of September, 1875. His statement of affairs shewed that his debts amounted to £9898 19s. 7d., and his assets to £2292 7s. 6d. He had been the treasurer of a society called the *Burngreave Funding Society*, which was a species of mutual benefit society, the members of which made small weekly pay-

C. J. B.

1876

*Ex parte*

DAY.

*In re*

DAY.

ments, which, when they amounted to a certain fixed sum, were called a share. The funds were lent out at interest to the members. The society consisted, in fact, of a number of sections or divisions, each of which, though governed by the same rules, and holding its meetings at the same place, was an independent body. *Day* was the treasurer of all the sections. Neither the society nor any of its sections was registered under the *Companies Act*, 1862, or any other Act, though there were altogether several hundred members. Two persons acted as secretaries of all the sections. The moneys subscribed by the members were paid to the secretaries, and were by them deposited with the treasurer. *Day* inserted the *Burngreave Funding Society* in his list of creditors as a creditor for £1969 18s. Notice of the first meeting was sent in the usual form, addressed to the society, and two persons, named *Hill* and *Jackson*, who had been the secretaries, attended the first meeting. Each of them, however, stated in his evidence that he did not attend on behalf of the society, but in his own individual capacity, he having at that time ceased to be secretary. The debt due to the society had not been proved. The creditors at the first meeting resolved on a liquidation by arrangement, and appointed a trustee. When the resolutions were presented to the Registrar for registration, he refused to register them, on the ground that the debtor ought to have shewn in his statement the amount due from him to each section of the society separately, and ought to have given notice of the meeting to each section separately; and further, that, in truth, *Day* was not indebted to the society or to the sections of it in their collective capacity, but was separately indebted to each member, and ought to have inserted the name of each member, with the amount due to him, in his statement of affairs, and to have given to each member a separate notice of the meeting.

The Judge affirmed the decision of the Registrar, but on the ground that the society was an illegal one, under sect. 4 of the *Companies Act*, 1862, and could not, therefore, have any officer able to represent it. It could only be represented legally by a liquidator, if it had been ordered to be wound up under sect. 199 of the Act. The debt due to the society could not, therefore, be represented at the meeting, and no valid proceedings for liquidation could be taken.

From this decision *Day* appealed.

*De Gex*, Q.C., and *Bagley*, for the Appellant:—

If the Judge's reasoning is correct, the society were not creditors at all. No notice of the proceedings to them was necessary, and the resolutions were duly passed. The existence of a debt due to an illegal body is no reason why the debtor should not file his petition; the only result is that the so-called creditors cannot recover: *Ewing v. Osbaldiston* (1); *Hall v. Franklin* (2). If there was a proveable debt it was sufficiently stated, and sufficient notice of the meeting was given to the society; if there was not a proveable debt, it was not necessary to give them any notice at all.

*Finlay Knight*, for opposing creditors:—

I contend that the notice was insufficient. It should have been given either to each of the sections, or to every individual member. In a bankruptcy some person could be appointed to prove this debt.

[BACON, C.J.:—Not if it is illegal.]

The money was simply advanced by the depositors to *Day*; an action for money had and received would have lain against him. Before the registration was allowed the Court ought to have finally decided the question whether the debt was a legal one or not.

BACON, C.J.:—

The only question I have to decide is whether those resolutions ought to have been entirely rejected. The meeting of creditors was held, and the debtor then, in the discharge of his duty, made a statement of his affairs, including among his debts the sum which he owed to this benefit society. The Judge has held that the society is not one on whose behalf any action or suit could have been sustained in respect of the debt. The result of that is that the debtor has inserted in his statement a debt which is not recoverable. The mere insertion in his statement cannot give the society a right to recover the debt as against the other creditors. The case is just as if the debtor had inserted a debt contracted

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1876

*Ex parte*  
DAY.

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(1) 2 My. & Cr. 53.

(2) 3 M. & W. 259.



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1876

*Ex parte*

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*In re*

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for an unlawful or immoral consideration. I can see no reason why the other creditors should be prejudiced by the non-registration of the resolutions. The so-called creditors, the society, will not be prejudiced if they are registered. They either have or have not a right to recover their debt. If they have, they will be able to recover it under the liquidation. If they have no such right, the registration of the resolutions is quite innocuous as to them. I have only to consider the interests of the creditors. The resolutions must be registered; that is all I now decide. I adopt the conclusion of the learned Judge that, *primâ facie*, the society is not entitled to share in the distribution of the debtor's assets. I think that every notice of the meeting which was possible was given to the society. It was given to *Hill* and *Jackson*, the persons who had been acting on their behalf. Unless I am to hold that the creditors of the defaulting trustee of such a society can under no circumstances resolve on a liquidation, I cannot refuse the registration of these resolutions.

Solicitor for Appellant: *C. Butcher*, agent for *W. E. Tattershall*, *Sheffield*.

Solicitors for Respondents: *Linklater & Co.*, agents for *Broomhead*, *Wightman*, & *Moore*, *Sheffield*.

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1876

*Jan. 31.*

*Ex parte* HODGKINSON. *In re* BESTWICK.

*Composition—Secured Creditor—Debt not proved—Effect of Debtor's Statement—Right to receive Composition on Balance due after Realization of Security—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 47, 126—Bankruptcy Rules, 1870, rr. 274, 279, 281, 283.*

A secured creditor is in no way bound by a compounding debtor's estimate of the value of his security.

He is entitled to abstain from proving his debt, or taking any part in the composition proceedings, and, when he has realized his security, he may claim from the debtor payment of the composition upon the balance which may then remain unsatisfied of the debt.

*affirmed by C. J. R. 2CLP. 485*  
THIS was an appeal from a decision of the Judge of the *Manchester County Court*.

*Thomas Bestwick* and *William Bestwick* were small-ware manu-

facturers at *Manchester* and *Salford*. On the 29th of November, 1870, they filed a liquidation petition. The first meeting of the creditors was held on the 23rd of December, 1870. The statement of the debtors' affairs then produced included in the list of their creditors the names of *George Enoch Hodgkinson* and *Henry Whitten*, and stated that they were creditors for the sum of £3300, as security for which they held a mortgage upon the *Paradise Mills* at *Salford*, the property of the debtors, consisting of buildings, engine, boiler, shafting, and machinery, the estimated value of which was £3300. The mortgage referred to was dated the 7th of November, 1870, and it contained a power of sale. Notice of the meeting was duly given to *Hodgkinson* and *Whitten*. The creditors present at the meeting resolved that a composition of 10s. in the pound should be accepted in satisfaction of the debts due to the creditors, the composition to be paid in two instalments of 5s. each, at three and six months from the date of the confirmation of the resolution, and to be secured to the satisfaction of the adjourned meeting. The second meeting of the creditors was held on the 5th of January, 1871, when the resolution passed at the first meeting was duly confirmed, and it was further resolved that the joint and several promissory notes of the debtors and of *John Perry* should be accepted as sufficient security for the payment of the composition. Due notice of this meeting also was given to *Hodgkinson* and *Whitten*. The resolutions were afterwards duly registered.

*Hodgkinson* and *Whitten* never proved or tendered any proof in this composition for the £3300, or any part thereof, nor was any composition thereon paid or tendered to them. The composition was duly paid to the other creditors. The debtors remained in possession of the *Paradise Mills* and other property comprised in the mortgage deed until the 2nd of April, 1872, and during that period they were in correspondence with *Hodgkinson* and *Whitten* respecting the sale of the mortgaged premises, and endeavoured to find a purchaser for them. On the 14th of July, 1871, they gave the mortgagees a bill for £127 16s. 6d., the amount of a half-year's interest on the mortgage debt, due in May, 1871. In August, 1871, the debtors sold the loose machinery about the mills (which was not included in the mort-

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*Ex parte*  
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*In re*  
BESTWICK.

gage), and on the 14th of December, 1871, they paid the mortgagees £651 9s. 5d., part of the proceeds of the sale, in part reduction of the mortgage debt. On the 9th of January, 1873, the debtors filed a second liquidation petition. On the 27th of January the creditors resolved to accept a composition of 20s. in the pound, payable in three instalments of 6s. 8d. each, at four, eight, and twelve months from the 10th of February, 1873. This resolution was confirmed at the second meeting of the creditors on the 10th of February, 1873, and was afterwards duly registered. The statement of the debtors produced to these meetings shewed that *Hodgkinson* and *Whitten* were creditors for £2155 17s. 9d., for which they held as security a mortgage on the *Paradise Mills*, together with engine, boiler, and shafting therein, the value of which was estimated at £2200. The surplus value of this security, £44 2s. 3d., was in the debtors' statement treated as part of their assets. Due notice of the meetings was given to *Hodgkinson* and *Whitten*, but they never proved or tendered any proof in this second composition for their mortgage debt or any part thereof, nor was any composition paid or tendered to them. On the 1st of June, 1873, *Hodgkinson* and *Whitten* sold the property comprised in the mortgage for £1228 15s. 4d. On the 23rd of August, 1873, they commenced an action against the debtors for the sum of £2151 14s., the balance which they claimed to be due in respect of the mortgage debt. On the 7th of August, 1874, an order was made by the County Court, restraining further proceedings in the action, and directing also a reference to the Registrar of the Court to inquire how much (if anything) still remained due to *Hodgkinson* and *Whitten* under their mortgage. The Registrar afterwards stated the account between the parties as follows:—

|                                          | £    | s. | d. |
|------------------------------------------|------|----|----|
| Due on the 29th November, 1870 . . .     | 3354 | 1  | 0  |
| Net proceeds of sale . . . . .           | 1228 | 15 | 4  |
|                                          | 2125 | 5  | 8  |
| 10s. in the pound on £2125 5s. 8d. . . . | 1062 | 12 | 10 |
| Less proceeds of machinery . . . . .     | 651  | 9  | 5  |
| Balance . . . . .                        | £411 | 3  | 5  |

The debtors contended that the mortgagees had no right to prove under the first composition, and a special case was settled by the Registrar for the opinion of the Court. The case stated the above facts, and the question submitted for the opinion of the Court was whether *Hodgkinson* and *Whitten* were bound by having elected to stand by their security under the petition of the 29th of November, 1870, or whether they were entitled to payment of the £411 3s. 5d.

The Judge was of opinion that the registration of the resolutions operated as a close of the proceedings in the composition, and that the mortgagees, being bound by the composition, could not now come upon the estate for the £411 3s. 5d., and that, as a matter of fact, they had elected to stand upon their security, and were therefore not entitled to payment of the £411 3s. 5d. An order was accordingly made to that effect, and that the costs of the preparation and argument of the special case should be paid by the mortgagees, but no order was made as to the costs of the action.

*Hodgkinson* and *Whitten* appealed.

*De Gex*, Q.C., and *Bagley*, for the Appellants:—

There is no such thing as the close of a mere money composition, or at any rate, it is not closed until the composition has been paid. There is no question of getting in the debtors' estate, as in a bankruptcy or a liquidation. Sect. 47 of the Act does not apply to a composition; the debtor retains his assets, and to any action brought by a creditor for his debt he can plead the composition resolutions. The debtors were bound to tender the composition to the mortgagees, but the belief of both parties at first was that the security was sufficient, and they both concurred in attempting to realize the property to the best advantage. The only election which the mortgagees can be said to have made is an election to leave things as they were, *i.e.*, to remain in the position of creditors holding a security which might or might not prove sufficient. Even if a bankruptcy had been formally closed, that would not prevent a creditor who had not proved his debt before from coming in and proving against any further assets which might be realized. In such a case, if the trustee had been released, the assets would vest in the Registrar as trustee.

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C. J. B. But, in the case of composition, there is nothing analogous to the close of a bankruptcy. Nor is there any necessity for a creditor to prove in a composition. In the present case both parties treated the debt as subsisting, and the debtors inserted it as such in their statement under their second petition.

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*Ex parte*  
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BESTWICK.

*Little, Q.C., and S. Taylor, for the debtors:—*

The mortgagees' security could not be affected by the composition: *Ex parte Jones* (1); but it was a matter of opinion what it would realize. The debtors, however, in their statement, say that the mortgagees are fully secured. That is a matter which not only concerns the debtors and the mortgagees, but affects the interests of all the other creditors. It is put before the creditors at the meeting that the estate will realize so much, and on the basis of this statement the composition is offered by the debtors and accepted by the creditors. It is the duty of a secured creditor, who is included in the debtor's statement, if he objects to the debtor's valuation of his security, to intervene in the proceedings before the second meeting, or, at the latest, before the registration of the resolutions. If he does not intervene, he is bound by the debtor's valuation. By sect. 126 of the Act the debts of secured creditors are to be estimated, and the votes are to be taken, in the same way in composition proceedings as in bankruptcy. The debtor's statement is to be registered with the resolutions, and the provisions of the composition are to be binding on all the creditors mentioned in the statement. The composition is to be in satisfaction of the debts. Rules 274, 279, 281, 283, throw further light on the nature and effect of the proceedings. If in this case the action at law had gone on, the debtors could have pleaded to it that the mortgagees were bound by the resolutions, which must have meant that, being fully secured, they were not entitled to receive anything more from the debtors. The case must now be tried in this Court just as it would have been in the action. A creditor cannot go behind the resolutions unless he can shew some default on the part of the debtors: *Edwards v. Coombe* (2); *Slater v. Jones* (3). Here the debtors have made no default. The creditors are in fact seeking to claim under the resolutions, and at

(1) Law Rep. 10 Ch. 663; *sub. ult.* (2) Law Rep. 7 C. P. 519.

(3) Law Rep. 8 Ex. 186.

the same time saying they are not bound by them. In bankruptcy or liquidation a secured creditor cannot participate in dividends without valuing or realizing his security. In *Ex parte Peacock* (1), *Mellish*, L.J., said (2): "It appears to me that the amount of debts inserted in the statement is the amount upon which the composition is to be paid . . . the creditors vote on the assumption that that statement is correct."

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BACON, C.J.:—

I have heard so many strange things argued that it is right I should recall attention to the facts of the case. Who are the parties litigating? The debtors and the creditor who claims to be paid the composition. There is no one else; the surety is out of the question. The facts are these. The debtors call a meeting of their creditors, and make a statement of their affairs according to the Form given in the Schedule to the Rules of 1870, shewing the amount of their debts and their means of satisfying them, and giving the names and addresses of their creditors, and this is done in order that the creditors may be able to form their own judgment. The debtors state that these particular creditors are fully secured, and it is argued that this statement imposes a duty on the creditors to intervene in the proceedings. This is the first time I ever heard of any such duty. The creditors are, no doubt, bound by the resolutions, but their security is not impaired. If they do not by means of it obtain payment of all that is due to them, the unpaid balance remains due from the debtors, according to their own plain acknowledgment. The mortgagees are bound by the resolutions, but only to this extent, that if their security is not sufficient to pay their whole debt, they cannot claim more than the composition upon the unpaid balance. Then these debtors become insolvent a second time, and file a second petition. Afterwards the mortgagees realize their security under the power of sale contained in their deed. In the exercise of their legal rights, which are in no degree affected, they realize their security, and the unpaid balance of their debt remains due to them, even according to the debtors' own statement. It is quite new to me to

(1) Law Rep. 8 Ch. 682.

(2) Law Rep. 8 Ch. 687.

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hear that they are in any way bound by the debtors' estimate of the value of the security. Why, a debtor might insert in his statement the name of a creditor in *America*, and say, on the balance of accounts between us I owe him only £5, or I owe him nothing at all. In the absence of the creditor such a statement could have no effect at all, except as bearing upon the good faith of the debtor. I do not say that in the present case there was any intention on the part of the debtors to mislead. But how can their statement affect the rights of the secured creditor? The other creditors cannot interfere with his security. How can the filing of the debtor's statement impose on him any obligation with regard to his security? It is said that the statement of the value of the security might affect the judgment of the creditors as to the amount of the debtor's property, and the composition which he is able to pay; but I can see no ground for that argument. If the statutory majority of creditors are satisfied with the debtor's statement, and agree to accept the composition which he offers, they thereby bind themselves and all the other creditors to accept that composition. But, in a litigation between the debtor and one of the creditors, the creditor cannot be affected by any representation made by the debtor. The creditor is only claiming the composition which is imposed on him by the resolutions. The effect of those resolutions is to make the debtor a free man if he complies with their conditions, and this is what it is now asked that these debtors shall do. But in the present case (though it is not necessary to go any further) the matter does not rest there. These creditors were restrained from exercising their legal right of suing the debtors, and a reference was directed to the Registrar to ascertain what remained due under the mortgage deed. No one then disputed that something remained due. That reference was pursued, the account was taken, and the Registrar has found that a balance remains due. The learned Judge says that the registration of the resolutions operates as the close of the composition, and that no creditor can after that make any claim against the estate of the debtors. I quite agree that the resolutions operated as a close of the proceedings for a composition, though it is quite a novel expression, but that only means that, as between the debtors and the creditors, it was then decided that the composition should close

accounts upon payment of the 10s. in the pound. But I do not agree that the effect of the resolutions was this, that these creditors could not, after they had realized their security, come upon the estate for, or rather claim to be paid by the debtors, the composition in respect of the deficiency which I find by the Registrar's certificate remains due. Then the second finding of the learned Judge is that the creditors have elected to stand on their security. What does that mean? There is not a trace of any evidence to shew that they ever consented to take the security in full satisfaction of their debt. Of course they stood on their security until they sold it to some one else. If they had come in and sought to prove in the composition, they must have valued their security, and they would have been bound by that value, as they would also have been bound, if they had sought the assistance of the Court in realizing their security, by the proceedings for that purpose. But nothing of that kind has been done. If the conclusion of the learned Judge is right, the result would be in every case of composition to impose on a secured creditor, whether present at the meetings or absent, the necessity of accepting his security, whether sufficient or not, in full satisfaction of his debt. The cases which have been cited to me have no application, and I am of opinion that there is no ground whatever on which the order can be supported. There is nothing in the Act or in the Rules, and there is no general principle of the law of bankruptcy, which can sustain it. I have no doubt that these creditors are entitled now, just as they would have been if they had realized their security before the resolutions, to prove for the balance of their debt, and consequently to receive the £411 3s. 5d. The Appellants must have their costs of the proceedings since the date of the agreement to state the special case, and also their costs of the appeal.

Solicitor for Appellants: *H. A. Maude*, agent for *J. & G. E. Webster, Sheffield*.

Solicitors for Debtors: *Pritchard, Englefield, & Co.*, agents for *Grundy & Kershaw, Manchester*.

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**AMALGAMATION OF COMPANIES**—*Insurance Company—Dissolution—Transfer of Liabilities—Unincorporated Company—Power to make Calls—Winding-up Acts.*] By the deed of settlement of the A. insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the A. company, and were to transfer to that other company a sufficient amount of the assets of the A. company. The A. company was accordingly dissolved, and a portion of its funds was transferred to the B. company, which covenanted to satisfy the liabilities of the A. company. Full notice of this transaction was sent to the policy-holders of the A. company; and in the policies of that company it had been declared that the funds and property of the company should alone be liable to make good the claims under the policy, and the deed of settlement was also referred to. Both companies were wound up, and came under the *European Assurance Society Arbitration Acts*:—*Held*, that the A. company had, without the consent of the policy-holders, a right to dissolve itself and transfer its liabilities to the B. company; and that a policy-holder could claim only against the B. company. —*Per Mellish, L.J.*:—On such a policy the holder could not have sued the shareholders separately; nor, after the company was dissolved, would there have been any means of compelling the shareholders to pay calls on their shares, the company being unincorporated, and having been formed before the passing of the Joint Stock Companies Acts and the Winding-up Acts; nor had the passing of those Acts affected the rights and liabilities of the parties. *In re EUROPEAN ASSURANCE SOCIETY. HORT'S CASE. GRAIN'S CASE* - - - 307

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**ARREST OF DEBTOR**—*continued.*

1875:—*Held*, that the case was governed by Rules of Court, 1875, Order XLIV., rule 2, and that an attachment for non-payment could not be issued without notice to the solicitor.—*Garling v. Royds* (1 Ch. D. 81) distinguished. *In re A SOLICITOR* [445

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2. — *Act of Bankruptcy*—*Assignment to secure past Debt and further Supplies of Goods*—*Property in Schedule.* A trader executed a bill of his furniture and other effects comprised in the schedule to secure a past debt. The schedule comprised all his property except his stock-in-trade and book debts. There was no covenant for further advances, but a verbal agreement by the creditor to supply him with further goods on credit, which he accordingly did:—*Held, by Bacon, C.J.*, that, assuming that the bill of sale comprised the whole of the debtor's property, it was not an act of bankruptcy:—*Held*, by the Lords Justices, on appeal, that the bill of sale did not comprise the whole property, and the decision of the Chief Judge affirmed on that ground. *Ex parte CHESTER. In re DUNGATE* - - - - - 293, n.

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# **ASSIGNMENT OF ALL DEBTOR'S PROPERTY—** *continued.*

deed was an act of bankruptcy, notwithstanding the fact that none of the partnership assets were in terms included in the deed.—A bill of sale contained a provision that it should be void in case the mortgagor should pay the principal money thereby secured “upon demand, if and when the mortgagee should so require by a notice in writing,” and until payment of the principal, should pay interest thereon half-yearly, and also a proportionate part thereof “to the expiration of the said notice, when the same shall be given.” And in default of payment power was given to the mortgagee to seize and sell the property comprised in the deed.—*Semble*, that the mortgagee was not entitled to seize on the same day on which he made a demand for payment, the demand not being at once complied with. *Ex parte TREVOR. In re BURGHARDT* - - - - - 297

4. — *Act of Bankruptcy—Bill of Sale—Past Debt and further Advances—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, sub-s. 2.* A trader, by deed reciting that the parties of the other part had agreed to give him further time for payment of £287 due for goods supplied to him by them, and to give him further credit for goods to be supplied to him by them, so that the whole debt should not exceed £500, upon condition of having such security given to them as thereafter mentioned, assigned to them substantially his whole property as a security for the sum already due, and such further moneys (if any) as should become due for goods supplied by them to the debtor. The deed contained no covenant to supply goods, but they were supplied to an amount exceeding the limit in the deed.—*Held* (affirming the decision of the Chief Judge), that the assignment was not an act of bankruptcy. *Ex parte SHEEN. In re WINSTANLEY* - - - - - 560

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See REINVESTMENT OF PURCHASE-MONEY. 2.**BUILDING SOCIETY**—"Advanced" or Borrowing Member—Mortgage by, to Society—Subsequent Alteration of Rules—Right to redeem.] A permanent benefit building society, comprising "unadvanced" or investing members, and "advanced" or borrowing members, lent to the advanced members at a premium the sums to which their shares would amount when fully paid up, taking from each of them a mortgage of freehold, copyhold, or leasehold property, to secure the sums advanced and the premiums, with interest thereon respectively. By his mortgage deed each advanced member covenanted to pay to the society, at the times and in manner prescribed by its rules "for the time being," the sums payable periodically, by way of subscription or otherwise, in respect of his shares until (1st) the shares with interest on the amount thereof in advance should be realized, and until (2nd) the premium and interest thereon should be paid, and that in the meantime (except when varied by those presents) all the rules "for the time being" of the society should in respect of the said shares be observed by the member. The proviso for redemption took effect in each case "if the said shares and premium and interest thereon respectively should be duly realized and paid according to the covenant."—*S.*, in the year 1866, obtained, for a premium of £130 10s., an advance of £600, in twenty-four shares of the society of £25 each, and executed a mortgage in this form. The society afterwards, in 1873, passed new rules, one of which provided that advanced members should, before redeeming their securities, pay an additional sum as a contribution towards certain losses sustained by the society, and another of which (Rule I) provided that, so far as the rules of law and equity would permit, the rules then passed should apply to all the members as well present as future, and to all its transactions as well past as future:—*Held*, that *S.* and the other members who were advanced before the passing of the new rules were, notwithstanding the reference in their covenants to the "rules for the time being," entitled to redeem their securities on payment only of those sums which they were liable to pay according to the rules in existence at the date of their respective contracts:—*Held*, also, that Rule I excluded from the operation of the new rules those members whose contracts would be substantially varied by them. *In re NORWICH AND NORFOLK PROVIDENT PERMANENT BENEFIT BUILDING SOCIETY. SMITH'S CASE* - - - 481**CABOWNER**—Custom of hiring cabs from coach-builder - - - 503, n.  
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See JOINT AND SEPARATE ESTATES.— *Mozley v. Alston* (1 Ph. 790) followed 13  
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See DEATH COUPLED WITH A CONTINGENCY.— *Rawbone's Trust, In re* (3 K. & J. 476) commented on - - - 521  
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- *Swift v. Wenman* (Law Rep. 10 Eq. 15) not followed - - - 563  
See DIVORCED HUSBAND.
- *Tassell v. Smith* (2 De G. & J. 713) explained - - - 491  
See CONSOLIDATION OF MORTGAGES.
- *Vint v. Padget* (2 De G. & J. 611) explained  
See CONSOLIDATION OF MORTGAGES. [491]
- *Wilmer v. Currey* (2 De G. & Sm. 347) considered - - - 30  
See JOINT AND SEVERAL LIABILITY.

**CHAMPERTY—Solicitor and Client—Agreement for Remuneration in the event of Success—Taxing Master—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 23), ss. 4, 11.]** By an agreement between clients and solicitors, it was agreed that in the event of the solicitors succeeding in recovering certain property for the clients, they should receive 10 per cent. on the value of the property. The agreement was submitted to the Taxing Master before the solicitors had taken any steps in the matter, and the Taxing Master required the opinion of the Court to be taken thereon under sect. 4 of the *Attorneys and Solicitors Act, 1870*:—*Held*, that the opinion of the Court on the validity or fairness of the agreement could not be required under sect. 4 of the Act, before any money was payable under the agreement.—*Semle*, the agreement in question was champerty, and invalid under sect. 11 of the Act. *In re ATTORNEYS AND SOLICITORS ACT, 1870* - - - 573

**CHARGE OF DEBTS—Will—Construction—Direction to pay Debts out of Rents and Profits of Real Estate—Charge on Corpus—Sale or Mortgage.]** A direction in a will to pay debts out of rents and profits of real estate *primâ facie* charges the debts on the corpus, unless the will contains a context shewing that annual rents and profits only are meant.—Where debts are charged on settled real estate the Court, in determining whether the debts are to be raised by sale or mortgage, will give greater weight to the wishes of the persons whose interests in the estate are immediate, than to those whose interests are more remote. *METCALFE v. HUTCHINSON* - - - 591

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**CHARITY—Christ's Hospital—Election of child** [160  
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— *Cy-près*, doctrine of - - - 497  
See CY-PRÈS.

— Friendly society—Dissolution - - - 497  
See CY-PRÈS.

— Lease to, of lands—Covenant to renew—Charity Commissioners - - - 447  
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**CHARITY COMMISSIONERS—Consent to lease**  
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**CHILD EN VENTRE SA MÈRE—Period of gestation** - - - 460  
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— Limitation to—Omission of daughters 375  
See MISTAKE IN SETTLEMENT.

— Maintenance - - - 226, 232  
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— Who shall attain twenty-one - - - 435  
See GIFT ON ATTAINING TWENTY-ONE.

**CLAIM—Statement of—Short cause** - - - 693  
See SHORT CAUSE.

**CLOSE OF BANKRUPTCY—Order of Discharge—After-acquired Property—Bankruptcy Act, 1869, ss. 15, 47—Bankruptcy Rules, 1870, rr. 124, 125—Costs of Trustee in Bankruptcy.]** After the close of a bankruptcy, property falling in to the bankrupt belongs to him, and not to the trustee in bankruptcy, although the bankrupt has not obtained an order of discharge. *In re PETTIT'S ESTATE* - - - 478

**CODE NAPOLEON, ART. 13—Naturalization** 257  
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See REPUBLICATION OF WILL.

**COMMISSIONERS—Charity—Consent to lease**  
See COVENANT FOR RENEWAL. [447]

**COMPANIES ARRANGEMENT ACT, 1870 (33 & 34 Vict. c. 104)—Sanction of Meeting—Majority of three-fourths present.]** Under the 2nd section of the *Companies Arrangement Act, 1870*, it is sufficient that the sanction of three-fourths in value of the creditors present at the meeting should be given to any proposed arrangement. *In re BESSEMER STEEL AND ORDNANCE COMPANY* - - - 251

**COMPANY—Agent for sale of goods—Lien for acceptances** - - - 631  
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— Amalgamation - - - 307, 326  
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— Arrangement of - - - 251  
See COMPANIES ARRANGEMENT ACT.

— Director—Contract by - - - 580  
See FIDUCIARY RELATION. 2.

— Insurance—Novation - - - 334  
See NOVATION.

— Internal management—Interference with 13  
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— Life assurance—Test of insolvency - - - 466  
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— Misrepresentation in prospectus - - - 182  
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— Novation—Insurance company - - - 334  
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— Reduction of capital—Division of proceeds among shareholders - - - 682  
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— Resolution to wind up - - - 38  
See RESOLUTION TO WIND UP.

— Subscriber of memorandum - - - 247, 620  
See SUBSCRIBER OF MEMORANDUM. 1, 2.

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- Transfer of shares - - - 576  
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- Trustee of shares for company - 664  
See TRUSTEE FOR COMPANY.
- Unincorporated—Power to make calls 307  
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- Winding-up—Official liquidator—Personal liability - - - 130  
See OFFICIAL LIQUIDATOR.
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- Winding-up—Proof by secured creditor 48  
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- Winding-up—Staying action - 44, 253  
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**COMPENSATION UNDER LANDS CLAUSES ACT—**

- Lunatic—Rent-charge—Lands Clauses Act, 1845.*  
Lands which were subject to a rent-charge in favour of a lunatic during his life were taken by a corporation acting under the *Lands Clauses Act*. The Court authorized the committee of the lunatic to release the lands from the rent-charge upon the corporation purchasing in the name of the lunatic a Government annuity of the same yearly amount for his life. *In re BREWER* - - - 409
- Death of Petitioner - - - 82  
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- Reinvestment - - - 28, 477  
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- Order on trustee to sue surety - - - 287  
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- Proof—Balance after realizing security 702  
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- Surety for payment - - - 537  
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**CONCURRENT PROCEEDINGS—**

- Suit in Lord Mayor's Court - - - Lord 4  
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**CONDITION—**

- Restraint of marriage—Public policy—Second marriage of man 399  
See RESTRAINT OF MARRIAGE.

**CONDUCT—**

- Election by—Conversion - 385  
See CONVERSION. 1.

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- Evidence by affidavit—Infant Defendant - - - 278, 604  
See EVIDENCE BY AFFIDAVIT. 1, 2.

**CONSIDERATION—**

- Assignment of all debtor's property - - - 290, 293, n., 560  
See ASSIGNMENT OF ALL DEBTOR'S PROPERTY. 1, 2, 4.

**CONSOLIDATION OF MORTGAGES—**

- Notice—Transfer.*  
First mortgage of *Blackacre* to *A.*, followed by subsequent mortgages to other persons to which *A.* had notice. After this, first mortgage by the same mortgagor of *Whiteacre* to *B.* After this, transfer of *A.*'s mortgage to *B.*, the mortgagor joining in the transfer; this transfer being made in pursuance of an agreement under which *B.* had paid off *A.* before the date of *B.*'s

**CONSOLIDATION OF MORTGAGES—continued.**

mortgage. At the date of this agreement *B.* had notice of the puisne mortgages of *Blackacre* :—*Held*, that *B.* could not consolidate the mortgages of *Blackacre* and *Whiteacre* as against the puisne mortgagees.—*Vint v. Padget* (2 De G. & J. 611) and *Tassell v. Smith* (2 De G. & J. 713) explained. *BAKER v. GRAY* - - - 491

**CONTEMPT, PROCESS OF—**

*Practice—Judicature Acts—Default in answering—Pending Suit—Attachment—Rules of Court, 1875, Order XLIV.* In a suit pending on the 1st of November, 1875, attachment for want of answer may issue against a Defendant under the old practice. *GARLING v. ROYDS* - - - 81

2. — *Contempt of Defendant—Non-Execution of Attachment—Rules of Court, 1875, Order XXIX., r. 10—Answer—Defence—Leave to take Bill pro confesso under Old Practice—Cons. Ord. XXII., r. 2.* Default in answering in a suit pending on the 1st of November, 1875, is not "default in delivering a defence" so as to entitle the Plaintiff to set down the action on motion for judgment under the Rules of Court, 1875, Order XXIX., rule 10. —Where attachment for want of answer had been issued against a Defendant in such a suit, and the sheriff reported that the Defendant was old and paralyzed, and that he could not execute the attachment without danger to life, the Court directed that the suit might be continued under the old practice, so as to enable the bill to be taken *pro confesso* under Cons. Ord. XXII., rule 2, and *held* that, under the circumstances, the actual execution of the writ of attachment might be dispensed with. *CULLEY v. BUTTIFANT* - 84

3. — *Costs of—Discharge from Custody—Debtors Act, 1869.* Since the *Debtors Act, 1869*, a Defendant who has cleared his contempt by filing his answer cannot be detained in prison for non-payment of the costs of his contempt, but the Court in ordering his discharge will make it part of the order that he do pay the costs of his contempt and of the motion to discharge him. *JACKSON v. MAWBY* - - - 86

4. — *Practice—Defendant in Contempt—Pending Suit—Rules of Court, 1875, Order XIII., r. 9; Order XXIX., r. 10.* Where a Defendant in a suit pending on the 1st of November, 1875, had failed to enter an appearance or put in an answer :—*Held*, that the cause should proceed under the new practice, and the bill be treated for all purposes as if it were the Plaintiff's statement of claim, so that the Plaintiff might proceed under Order XIII., rule 9, and Order XXIX., rule 10.—*Culley v. Buttifant* (1 Ch. D. 84) distinguished. *PROVIDENT PERMANENT BUILDING SOCIETY v. GREENHILL* - - - 624

**CONTINGENT REMAINDER—**Child who shall attain twenty-one - - - 435  
See GIFT ON ATTAINING TWENTY-ONE.

**CONTINGENT SHARES—**

Infant's maintenance [226, 232  
See MAINTENANCE OF CHILDREN. 1, 2.

**CONTINUANCE OF PROCEEDINGS—**

*Practice—Judicature Acts—Rules of Court, 1875, Order L—Petition—Abatement—Death of Petitioner—Continuance of Petition by Executors of Petitioner.* Where a sole Petitioner dies after an order made



**CONTINUANCE OF PROCEEDINGS—continued.**

on the petition directing inquiries, and whilst those inquiries are pending, the Court will order the petition to be continued and carried on by the representatives of the Petitioner. *In re ATKINS' ESTATE* [82]

- Under old practice - - - 83, 89, 464  
     *See PROSECUTION OF PENDING PROCEEDINGS.* 1, 2, 3.

- CONTRACT**—Director of company - - - 580  
     *See FIDUCIARY RELATION.* 2.

- Promoter of company - - - 182  
     *See MISREPRESENTATION IN PROSPECTUS.*

- CONTRIBUTORY**—Misrepresentation in prospectus - - - 182  
     *See MISREPRESENTATION IN PROSPECTUS.*

- Subscriber of memorandum - 247, 620  
     *See SUBSCRIBER OF MEMORANDUM.* 1, 2.

- Transfer of shares - - - 576  
     *See TRANSFER OF SHARES.*

- Trustee of shares for company - 664  
     *See TRUSTEE FOR COMPANY.*

**CONVERSION**—*Reconversion into Realty—Election by Conduct—Trust for Sale, Proceeds to become Personal Estate—Rights of unpaid Legatees.* [A testator, after giving certain legacies, devised a freehold house to A., B., and C., in trust for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to A., B., and C. A., B., and C. paid all the legacies except two out of other parts of the testator's estate, and kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, and the two legatees permitted their legacies to remain all that time unpaid, without requiring a sale or any formal security on the house:—*Held*, in a suit by the personal representative of C. against the real and personal representatives of the testator for the administration of his estate, that A., B., and C. had by their conduct elected to take the house as reconverted into real estate; that the assent of the unpaid legatees might be inferred; and bill dismissed accordingly.—The decree of *Hall, V.C.*, reversed on further evidence. *MUTLOW v. BIGG* [385]

2. — *Real Estate of Infant—Partition Suit—Sale under Decree—Partition Act, 1868 (31 & 32 Vict. c. 40), s. 8—Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), ss. 23–25.*] Where real estate to a share of which infants were entitled was sold under the decree in a partition suit:—*Held*, that the proceeds of sale must be treated as realty, by force of the 8th section of the *Partition Act, 1868*, incorporating the provisions of sects. 23 to 25 of the *Leases and Sales of Settled Estates Act*.—*STEED v. PREECE* (Law Rep. 18 Eq. 192) distinguished. *FOSTER v. FOSTER* 588

- CONVEYANCE**—Legal estate - - - 279  
     *See BARE TRUSTEE.*

- CORPORATION**—Discovery by public officer 171  
     *See STAYING PROCEEDINGS.* 3.

- CORPUS**—Charge of debts—Real estate - 591  
     *See CHARGE OF DEBTS.*

- COSTS**—Administration suit—Revocation of administration - - - 535  
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**COSTS—continued.**

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     *See TAXATION OF COSTS.* 2.

- Appeal—Successful Appellants—County Courts - - - 113  
     *See COSTS OF APPEAL.*

- Appeal—Successful Appellant—New practice—Order LV. - - - 41  
     *See MEMORANDUM AS TO NEW PRACTICE.*

- Contempt—Discharge from custody - 86  
     *See CONTEMPT, PROCESS OF.* 3.

- Former unsuccessful action - - - 1  
     *See TRANSFER OF PROCEEDINGS.* 1.

- Marshalling for payment of - - - 626  
     *See MARSHALLING.*

- Non-payment of—Solicitor—Attachment *See ARREST OF DEBTOR.* [445]

- Taxation - - - 111, 600  
     *See TAXATION OF COSTS.* 1, 2.

- Trustee Relief Act - - - 611  
     *See TRUSTEE RELIEF ACT.*

- Winding-up—Personal liability of official liquidator - - - 130  
     *See OFFICIAL LIQUIDATOR.*

- Winding-up petition—Withdrawal by Petitioner - - - 617  
     *See WINDING-UP PETITION.*

**COSTS OF APPEAL**—*Successful Appeal—Judicature Act, 1875 (38 & 39 Vict. c. 77), Order LVIII., r. 5.*] In appeals from orders made by County Courts in Bankruptcy presented since the 1st of November, 1875, a successful Appellant will, as a general rule, be entitled to his costs of appeal. *Ex parte MASTERS. In re WINSON* - - - 113

- COUNSEL**—Hearing of—Question of fact - 694  
     *See TRIAL OF QUESTION OF FACT.*

- COUNTY COURT**—Costs—Appeal—Bankruptcy *See COSTS OF APPEAL.* [113]

- COURT OF APPEAL**—Jurisdiction—Transfer of pending proceedings - 11, 12  
     *See TRANSFER OF PROCEEDINGS.* 2, 3.

**COVENANT FOR RENEWAL**—*Charity—Lease for Lives by Governors of Hospital—Statutes 13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 11—Charity Commissioners—Charitable Trusts Amendment Act (18 & 19 Vict. c. 124), s. 29.*] In 1836 the governors or trustees of a hospital had granted a lease of land in the city of E. for a term of 41½ years from a past date, which left forty years and a month from the date of the lease, with a concurrent term of ninety-nine years if A., B., and C. should so long live, and they covenanted during the term of forty years and a month to add new lives when any dropped. In 1857, on the death of A., the governors put in a new life. In 1872 B. died, and the governors refused to put in another life, the Charity Commissioners having claimed the right to forbid the lease under 18 & 19 Vict. c. 124, s. 29. The lessee thereupon filed his bill against the governors for the specific performance of the covenant for renewal:—*Held*, that the lease was void under the statutes of *Elizabeth*, and that the covenant could not now be enforced so as to bind the charity estate.—*Semble*, the Charity Commissioners misconceived their powers under sect. 29 of the *Charitable Trusts Amend-*

**COVENANT FOR RENEWAL—continued.**

*ment Act, 1855, in refusing their sanction to the proposed renewal.* *MOORE v. CLENCH* - 447

**COVENANT NOT TO BUILD—Covenant not to**

*erect "Building"—Erection of Bay Window—Breach of Covenant—Damage—Interference with Privacy—Injury to Property—Right to sue.* The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mortgagees in fee in possession of the estate, their heirs and assigns, not to erect any "building" on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, and about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, and carried from the foundation up to the roof.—Upon bill for injunction filed by the transferee from the mortgagees, and by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—*Held*, first, that the bay windows were "buildings" within the meaning of the covenant, and the erection of them a violation of it; secondly, that there being a clear breach of covenant, the covenantees were entitled to their injunction without the necessity of shewing damage; thirdly, that invasion of privacy constituted damage; fourthly, that the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy; and fifthly, that both the Plaintiffs had material interests sufficient to support the suit. *LORD MANNERS v. JOHNSON* - 673

**CREDITOR**—Deficient estate—Funds subsequently coming in - - - 243

*See DISTRIBUTION OF DEFICIENT ESTATE.*

—Secured—Injunction against - - - 557

*See INJUNCTION IN BANKRUPTCY.*

—Secured—Proof in bankruptcy - - - 702

*See CREDITOR HOLDING SECURITY. 2.*

—Secured—Proof in winding-up—Pending winding-up - - - 48

*See CREDITOR HOLDING SECURITY. 1.*

**CREDITOR HOLDING SECURITY**—*Company—Judicature Act, 1875, s. 10—Winding-up before Commencement of the Act—Claim by Secured Creditors—Rule in Bankruptcy.* The provisions of sect. 10 of the *Judicature Act, 1875*, which direct that in the winding-up of any company whose assets may prove insufficient for the payment of its debts the same rules shall be observed as may be in force under the law of bankruptcy, are not retrospective, and do not apply to the case of a winding-up commenced before the commencement of the Act.—Accordingly, where a supervision order had been made before the commencement of the Act:—*Held*, that secured creditors, although their claim had not been ascertained or admitted, were entitled to prove for the full amount of their debts without deducting the value of their securities. *In re JOSEPH SUCHE & Co., LIMITED* - - - 48

2. —Composition—Debt not proved—Effect of Debtor's Statement—Right to receive Composition on Balance due after Realization of Security—

**CREDITOR HOLDING SECURITY—continued.**

*Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 47, 126—Bankruptcy Rules, 1870, rr. 274, 279, 281, 283.* A secured creditor is in no way bound by a compounding debtor's estimate of the value of his security.—He is entitled to abstain from proving his debt, or taking any part in the composition proceedings, and, when he has realized his security, he may claim from the debtor payment of the composition upon the balance which may then remain unsatisfied of the debt. *Ex parte HODKINSON. In re BESTWICK* - - - 702

**CROSS-BILL**—Discovery by original Plaintiff—Staying proceedings - - - 171

*See STAYING PROCEEDINGS.*

**CROSS-EXAMINATION ON ACCOUNTS—Practice. The rule that in cross-examination upon an account, notice of the items to which the cross-examination will be directed must be given to the party bringing in the account, applies to the cross-examination of a party seeking to charge by his account as well as to the case of a merely accounting party. *BATES v. ELEY* - - - 473**

**CUSTOM**—Hiring goods—Cabowner - 503, n.

*See ORDER AND DISPOSITION. 3.*

—Hiring goods—Hotel-keeper - - - 501

*See ORDER AND DISPOSITION. 2.*

**CY-PRÈS**—*Friendly Society, Bequest in Aid of its Funds—Residuary Bequest—Charity.* A friendly society is not a charitable institution, and therefore the doctrine of *cy-près* will not, on the society being voluntarily dissolved, be applied to a bequest made to it in aid of its funds, but the same will fall into the testator's residuary estate. *In re CLARK'S TRUST* - - - 497

**DAUGHTERS**—Omission of, in settlement - 375

*See MISTAKE IN SETTLEMENT.*

**DEATH**—Petitioner—New practice - - - 82

*See CONTINUANCE OF PROCEEDINGS.*

—Without issue - - - 346

*See DEATH COUPLED WITH A CONTINGENCY.*

**DEATH COUPLED WITH A CONTINGENCY—**

*Will—Construction—Tenant for Life—"Die without Issue"—Period of Division.* A testatrix devised and bequeathed her separate estate to her husband for life, and after his death to be divided amongst her five children, and if any of her children should die without issue, that then that child's share should be divided among the children then living; but if any child should die leaving issue, that issue should take its parent's share. The five children of the testatrix all survived the tenant for life:—*Held* (reversing the decision of *Bacon, V.C.*), that the estate was, at the death of the tenant for life, to be divided between the five children absolutely.—*O'Mahoney v. Burdett* (Law Rep. 7 H. L. 388) and *Ingram v. Soutten* (Law Rep. 7 H. L. 408) distinguished. *OLIVANT v. WRIGHT* - - - 346

**DEBT**—Contracted abroad - - - 509

*See DEBTOR'S SUMMONS. 2.*

—Statement of debts—Liquidation—Debt to illegal association - - - 699

*See STATEMENT OF DEBTS.*



**DEBTOR'S SUMMONS**—*Bankruptcy Act*, 1869, s. 6, sub-s. 6—*Adjudication—Several Debts—Payment of one—Tender.*] Two creditors whose debts together amount to more than £50, though each debt is less, can issue a debtor's summons on which the debtor can be adjudicated bankrupt.—A tender of the amount of his debt to one of the creditors in such a case does not prevent the adjudication. *In re ANDREW* - - - 358

2. — *Foreign Debtor and Creditor—Debt contracted abroad—Place of Residence—Bankruptcy Act*, 1869, s. 59—*Bankruptcy Rules*, 1870, r. 17.] A debtor's summons may be taken out by a foreign creditor against a foreign debtor who is at the time in *England* in respect of a debt contracted abroad.—The 59th section of the *Bankruptcy Act*, 1869, and Rule 17 of the *Bankruptcy Rules*, 1870, determine in what Court a debtor who is liable is to be sued, and do not affect the question whether he is liable. *Ex parte PASCAL. In re MYER* - - - 509

**DECREE**—Before Judicature Act—Appeal 13  
See APPEAL IN PENDING PROCEEDINGS.

— Partition suit—Sale - - - 52  
See PARTITION SUIT.

**DEFAULT IN ANSWERING**—Contempt 81, 84  
See CONTEMPT, PROCESS OF. 1, 2.

**DEFENDANT**—Application for injunction and receiver - - - 600  
See RECEIVER. 5.

— Claim against third party - - - 176  
See NOTICE OF ACTION TO THIRD PARTY.

**DELIVERY OF GOODS**—Stoppage *in transitu* 101  
See STOPPAGE IN TRANSITU.

**DELIVERY OF SECURITIES**—Motion for - 643  
See MOTION FOR ACCOUNTS. 2.

**DEPOSIT BY RAILWAY COMPANY**—Investment - - - 697  
See INVESTMENT OF MONEY IN COURT.

**DESCRIPTION OF PARCELS** - - - 61  
See MISTAKE IN WILL.

**DESIGNATION**—Illegitimate children - 644  
See ILLEGITIMATE CHILDREN. 2.

**DEVISE IN TAIL**—*Will—Life Estate—Implication—Vested Estate—Executory Devise—Rents undisposed of—Outstanding Legal Estate.*] A testator, by a will dated in 1832, devised lands to *T.* during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son then over. The legal estate in the lands was outstanding. *T.* died leaving an eldest son, a minor:—*Held*, by *Hall, V.C.*, that the eldest son would, on attaining the age of twenty-one years, take an estate for life, and that the rents and profits in the meantime were undisposed of and went to the heir of the testator:—*Held*, by the Court of Appeal (reversing the decision of *Hall, V.C.*), that on the death of *T.*, the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one years, with an executory devise over in that event to *T.* in tail. *ANDREW v. ANDREW* - 410

**DEVISE OF MORTGAGED ESTATES**—*Will—Gift of "all my real and personal Property"—Charge of Debts—Vendor and Purchaser Act*, 1874, s. 9.] A testator who was mortgagee in fee

**DEVISE OF MORTGAGED ESTATES**—*continued.* with a partial beneficial interest in the equity of redemption, devised to trustees all his real and personal estate upon trust, first, to pay his debts and funeral and testamentary expenses, and then, upon certain trusts, for his wife and children; and he gave to his trustees powers to sell or mortgage any part of his estate. The will contained no devise of trust or mortgaged estates:—*Held*, on a summons under the *Vendor and Purchaser Act*, 1874, s. 9, that the legal estate in the mortgaged property did not pass under the will. *In re PACKMAN AND MOSS* - - - 214

**DILAPIDATIONS**—Sequestration of benefice 438  
See SEQUESTRATION.

**DIRECTOR**—Paid-up shares—Corrupt bargain  
See FIDUCIARY RELATION. 1. [115]

— Provisional—Contract by - - - 580  
See FIDUCIARY RELATION. 2.

— Suit against - - - 13  
See SUIT BY SHAREHOLDER.

**DISCHARGE FROM CUSTODY**—Contempt—Costs  
See CONTEMPT, PROCESS OF. 3. [86]

**DISCHARGE IN BANKRUPTCY**—After-acquired property - - - 478  
See CLOSE OF BANKRUPTCY.

**DISCOVERY**—Refusal of—Staying proceedings  
See STAYING PROCEEDINGS. 3. [171]

**DISENTAILING DEED**—When necessary—Settled Estates Act—Proceeds of sale - 438  
See PAYMENT OUT OF COURT.

**DISSOLUTION OF MARRIAGE**—Effect on right of husband - - - 563  
See DIVORCED HUSBAND.

**DISTRESS AFTER BANKRUPTCY**—*Rent accrued due after Commencement of Liquidation—Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), ss. 23, 31, 34.] When the trustee of a liquidating debtor continues in possession of premises of which the debtor was tenant, not having disclaimed the lease, the landlord has a right, as against the trustee, to distrain, without obtaining any leave from the Court, for rent accruing due after the commencement of the liquidation, even though it be rent which, under the terms of the lease, is payable in advance. *Ex parte HALE. In re BINNS* - - - 285

**DISTRIBUTION**—Administration suit—Deficient estate - - - 243  
See DISTRIBUTION OF DEFICIENT ESTATE.

— *Per capita* or *per stirpes* - - - 380  
See GIFT PER CAPITA OR PER STIRPES.

— Period of - - - 346  
See DEATH COUPLED WITH A CONTINGENCY.

**DISTRIBUTION OF DEFICIENT ESTATE**—*Administration Suit—Funds subsequently coming in—Vested Rights of Original Creditors—Apportionment of Fund.*] Where, in the case of a deficient estate, the creditors have been ascertained, and the available assets divided amongst them, and at a subsequent period further funds come in belonging to the estate, and some only of the creditors or their representatives appear in answer to advertisements, those who so appear are only entitled to the proportions of the fund distributable which their debts bear to the entire liabilities of the

**DISTRIBUTION OF DEFICIENT ESTATE—*contd.***

estate, and the remainder must be retained to meet any future claims by the other creditors. *ASHLEY v. ASHLEY* - - - - 243

**DIVORCED HUSBAND—*Marriage Settlement—Trust for Wife if she survived her Husband—Dissolution of Marriage—Effect of Decree—Husband's Interest.***

[By a marriage settlement property, in which the wife and her father were jointly interested, was settled upon trust for the wife during the joint lives of herself and her husband, and, after her decease, for him for his life, and then upon trusts for the children of the marriage (of whom there were none living), and in default of children, for the wife absolutely if she should survive, but if she should die in the husband's lifetime, then as she should by will appoint, and in default of appointment, for her father. The marriage was dissolved on the petition of the wife. In a suit by the wife claiming to be absolutely entitled to the trust fund:—*Held*, that the husband's rights were not forfeited by the dissolution of the marriage, and that the bill must be dismissed with costs.—*Jessop v. Blake* (3 Giff. 639), *Swift v. Wenman* (Law Rep. 10 Eq. 15), and *Fussell v. Dowding* (Law Rep. 14 Eq. 421), not followed. *FITZGERALD v. CHAPMAN* - 563

**DOMICIL—*Peer of England—Code Napoléon, Art. 13—Intestacy—Distinction between Domicil de facto and legal Domicil in France.*** [A peer of the British Parliament is not, by reason of his obligation to attend the House of Peers whenever his presence there is required, incapacitated from acquiring a domicile of choice in a foreign country.—A *de facto* domicile governing the succession to personal property of which he dies intestate may be acquired in *France* by a foreigner who has not obtained the Government authorization imposed by the *Code Napoléon*, Art. 13, as the condition for enjoyment by a foreigner resident in that country of full civil rights. *HAMILTON v. DALLAS* [257

**EASEMENT—*Alteration of—Change in use of dominant tenement—*** - - - 362  
See *WAY*.

**ECCLESIASTICAL DILAPIDATIONS—*Sequestration—*** - - - - 438  
See *SEQUESTRATION*.

**EDUCATION—*Infant children—Allowance for*** 226  
See *MAINTENANCE OF CHILDREN*. 1.

**ELECTION—*To take as real and personal estate—Conduct—*** - - - - 385  
See *CONVERSION*. 1.

**ELECTION TO CHRIST'S HOSPITAL—*Charity—Qualification of Candidate—Word "Parishioner"—Bona fides.*** Under a charity scheme sanctioned by the Court, by which a parish was empowered to elect children for *Christ's Hospital*, it was provided that no child should be eligible unless born in the parish, or unless his parents or one of them should be or should have been parishioners or a parishioner of the parish:—*Held* (reversing the decision of *Malins, V.C.*), that the word "parishioner" must be taken in its ordinary sense of a person occupying premises which are liable to be rated in the parish. Therefore, where a man took a house temporarily, before

**ELECTION TO CHRIST'S HOSPITAL—*continued.***

the election, for the purpose of obtaining a qualification for his son, for which he paid rent and rates, and his son was elected by the parishioners, it was held that the qualification was good and the election valid.—Observations on the expression "a *bonâ fide* parishioner." *ETHERINGTON v. WILSON* - - - - 160

**EQUITABLE ASSIGNMENT—*Claim of possession***  
See *ORDER AND DISPOSITION*. 5. [554

**EQUITABLE DEFENCE—*Stay of action—*** 155  
See *STAYING PROCEEDINGS*. 2.

**ESTATE TAIL—*Implication—*** - - - 410  
See *DEVISE IN TAIL*.

— *Proceeds of sale—Settled Estates Act—Disentailing deed—* - - - 438  
See *PAYMENT OUT OF COURT*.

**EUROPEAN SOCIETY ARBITRATION ACTS, 1875** - - - - 307, 326  
See *AMALGAMATION OF COMPANIES*. 1, 2.

**EVIDENCE—*Affidavits—*** - - - 278, 604  
See *EVIDENCE BY AFFIDAVIT*. 1, 2.

— *Appeal—Adding fresh evidence—* 562  
See *ADDING FRESH EVIDENCE*.

— *Pending proceedings—* - - - 89, 464  
See *PROSECUTION OF PENDING PROCEEDINGS*. 2, 3.

— *To explain will—"All my daughters"—* 644  
See *ILLEGITIMATE CHILDREN*. 2.

**EVIDENCE BY AFFIDAVIT—*Practice—Judicature Act—Rules of Court, 1875, Order XXXVIII., r. 1—Consent.*** [The "consent for taking evidence by affidavit" under the Rules of Court, 1875, Order XXXVIII., rule 1, must be a formal consent in writing. *NEW WESTMINSTER BREWERY COMPANY v. HANNAH* - - - - 278

2. — *Practice—Consent by Infant Defendant—Rules of Court, 1875, Order XXXVII., r. 1; Order XXXVIII., r. 1.* [The guardian *ad litem* of an infant Defendant is competent to give the consent requisite for taking evidence by affidavit under the Rules of Court, 1875, Order XXXVIII., rule 1. *KNATCHBULL v. FOWLE* - - - - 604

**EX PARTE APPLICATION—*Provisional liquidator—*** - - - - 466  
See *PROVISIONAL LIQUIDATOR*.

**EXCESSIVE APPOINTMENT—*Testamentary Power of Appointment—Fund—Lapse—Hotchpot Clause—Life and Reversionary Interests.*** [The donee of a testamentary power of appointment over a fund of £7000 exercised the power by appointing sums of £1995, £4000, £4000, and £5, amounting in all to £10,000. The appointee of one of the sums of £4000 died in the testator's lifetime:—*Held*, that the other appointees, and not the persons who would take in default of appointment, were entitled to the benefit of the lapse.—*Life and reversionary interests must be brought into hotchpot under the usual hotchpot clause.* *EALLES v. DRAKE* - - - - 217

**EXECUTION—*Leave to issue—*** - - - 9  
See *LEAVE TO ISSUE EXECUTION*.

**EXECUTION CREDITOR—*Jurisdiction—Bankruptcy annulled—Composition—Property vesting in Trustee—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 72, 81, 87.*** [A trader was adjudicated bankrupt on the petition of a creditor who was



**EXECUTION CREDITOR**—*continued.*

under an execution, in possession of chattels belonging to the trader. Under orders of the Court, the bankruptcy was afterwards annulled, and the property of the debtor was assigned by him to the same person who was trustee in the bankruptcy, on trust to secure payment of a composition which the majority of the creditors had agreed to accept. The execution creditor then threatened to proceed with his execution :—*Held*, that as the assignment had been made and the composition had been accepted with the approval of the Court, the Court retained jurisdiction over the execution creditor, though the bankruptcy had been annulled :—*Held*, that the chattels were vested in the trustee discharged from the execution, and that the creditor ought to be restrained from proceeding with the execution. *In re CHIDLEY. In re LENNARD* 177

— Receiver—Possession of sheriff - 454  
See RECEIVER. 4.

**EXECUTORY DEVISE**—Estate tail by implication  
See DEVISE IN TAIL. [410]

**FALSA DEMONSTRATIO** - - - 61  
See MISTAKE IN WILL.

**FATHER**—Insuring son's life - - 419  
See ILLEGAL POLICY.

**FIDUCIARY RELATION**—*Directors—Qualification found by Promoter—Fully paid-up Shares.*

*W.* entered into an agreement with a person as trustee of an intended company for the sale to the company of a property for a certain sum in cash and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the company when formed. The company was formed, and the agreement was set out in the articles. *W.* applied to the Appellants to become directors, which they agreed to do upon his promising to transfer to them fully paid-up shares to qualify them. They acted as directors, and adopted the agreement for sale. The number of shares requisite for the qualification of a director was five, but after the completion of the purchase thirty paid-up shares were, by the direction of *W.*, allotted to each of the Appellants, and they were entered on the register as holders each of thirty fully paid-up shares, and received certificates to that effect. An order was afterwards made for winding up the company, and the Master of the Rolls settled them on the list of contributories for thirty unpaid shares each :—*Held*, on appeal, that the Appellants, as to the shares allotted to them, stood in the same position as if those shares had been allotted to *W.* and transferred to them by him; and that, as there was no contract between them and the company that they would take shares independently of their accepting certificates stating them to be the holders of these fully paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares; and the order of the Master of the Rolls was discharged without prejudice to any application that might be made against them under the *Companies Act*, 1862, s. 165, or otherwise, on the ground that they had entered into a corrupt bargain with *W.* *In re WESTERN OF CANADA OIL, LANDS, AND WORKS COMPANY. CARLING, HESFELER, AND WALSH'S CASES* - - - 115

**FIDUCIARY RELATION**—*continued.*

2. — *Company—Purchase of Business—Provisional Director—Contract with Vendors to Company pending Incorporation—Liability to account.* In August, September, and October, 1872, negotiations were carried on for the purchase of the business of *F. & B.* by a limited company. *M.*, who often had large contracts with *F. & B.* for the delivery of goods, on the 7th of September agreed to become a director of the proposed company, and on the 24th of September an agreement was entered into between *F. & B.* and a trustee for the company for the purchase and taking over by the company as from the 1st of September the business of *F. & B.*, and for carrying on all contracts entered into by them as buyers or sellers. On the 7th of October *M.* attended a meeting of the directors. On the 24th of October the memorandum and articles of association were signed by *M.* The articles ratified the agreement of the 24th of September. On the 31st of October the company was incorporated. On the 15th and 25th of October, and on subsequent dates, *M.* entered into contracts with *F. & B.*, and afterwards with the company, for the delivery of goods; some of the goods under the earlier contracts were not delivered by the 31st of October.—In a suit by the company to make *M.* liable to account for profits made on all these contracts :—*Held*, that he was not, under the circumstances, liable to account for profits in respect of contracts prior to the incorporation of the company, but only for those after that date. *ALBION STEEL AND WIRE COMPANY v. MARTIN 580*

**FOLLOWING ASSETS** — *Will—Administration Suit—Payment of Debts—Fund in Court—Assignments for Value—Prior Right of Creditor.* In an administration suit all the certified debts were paid, and the residuary legatees were declared entitled to the estate of the testator subject to an annuity, to provide for which a fund was retained in Court to the credit of the cause.—The fund in Court was assigned for value by the residuary legatees, and stop orders were obtained. Afterwards other creditors of the testator established their claim in another suit, to which the executor of the testator and the residuary legatees were parties :—*Held*, that these creditors were entitled to payment out of the fund in Court in priority to the assignees of the residuary legatees. *HOOPER v. SMART. PIPER v. PIPER. BAILEY v. PIPER 90*

**FOREIGN DEBTOR AND CREDITOR**—Debtor's summons - - - 509  
See DEBTOR'S SUMMONS. 2.

**FOREIGN REPUBLIC** — Discovery by public officer - - - 171  
See STAYING PROCEEDINGS. 3.

**FRAUD**—Misrepresentation in prospectus - 182  
See MISREPRESENTATION IN PROSPECTUS.  
— Voluntary settlement—Insolvency of settlor  
See FRAUDULENT CONVEYANCE. [636]

**FRAUDULENT CONVEYANCE**—*Voluntary Settlement—Insolvency of Settlor—Debts in excess of Assets—Fraud upon Creditors.* A trader, doing business to the amount of £100,000 per annum, executed two voluntary settlements in favour of his wife, the first being two years and the second one year before his death. By the first he settled two policies of assurance, each for £1000; by the

**FRAUDULENT CONVEYANCE**—*continued.*

second he settled his furniture, worth about £1000. An inquiry into the state of his affairs having been directed, it was found that at the date of the first settlement his debts would have exceeded his assets by £1293, and at the date of his second settlement his debts were £10,726 over his assets. A bill was filed by a creditor whose debt was contracted after the first but before the second settlement, to set aside both deeds. No debt was proved to exist which had been contracted at the date of the first settlement:—*Held*, that as the settlor's debts exceeded his assets when both deeds were executed, he was then insolvent, and the deeds must be declared fraudulent and void as against the Plaintiff and his other creditors. *TAYLOR v. COENEN* - - - - - 636

**FRAUDULENT DEBTOR**—Prosecution of, under Debtors Act - - - - - 151  
See PROSECUTION OF BANKRUPT.

**FRIENDLY SOCIETY**—Bequest to—*Cy-près* 497  
See *CY-PRÈS*.

**FUND IN COURT**—Amount—Rights of creditors  
See FOLLOWING ASSETS. [90]

**FURTHER CONSIDERATION**—Adjournment of  
See MOTION FOR JUDGMENT. 2. [692]

**GENERAL GIFT**—Estates held on mortgage—  
Legal estates - - - - - 214  
See DEVISE OF MORTGAGED ESTATES.

**GENERAL RULES IN BANKRUPTCY, 1870, r.**  
117 - - - - - 509  
See DEBTOR'S SUMMONS. 2.

— **rt. 124, 125** - - - - - 478  
See CLOSE OF BANKRUPTCY.

— **rt. 274, 279, 281, 283** - - - - - 702  
See CREDITOR HOLDING SECURITY. 2.

— **r. 295** - - - - - 537  
See SURETY FOR PAYMENT OF COMPOSITION.

— **1871, r. 8** - - - - - 111  
See TAXATION OF COSTS. 1.

**GIFT ON ATTAINING TWENTY-ONE**—*Will—Estate for Life—Remainder, vested subject to be divested or Contingent—Words, "Who shall attain the Age of Twenty-one."*] Devise to *C. M.* for life, and in the event of his leaving a son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son and his heirs if he should live to attain twenty-one, with remainder over:—*Held*, that on the death of *C. M.* his infant son took a vested estate in the devised property subject to be divested if he should die under twenty-one.—The rule in *Festing v. Allen* (12 M. & W. 279) does not apply to such a case, there being a contrary intention shewn in the words "born or to be born in due time after his decease." *MUSKETT v. EATON* - - - - - 435

**GIFT PER CAPITA OR PER STIRPES**—*Will—Construction.*] A testatrix gave the income of one moiety of her residuary estate to her daughter *Margaret* for life, and the income of the other moiety to her daughter *Mary Ann* for life, and then directed her trustees to stand possessed of one moiety of her estate from and after the death of *Margaret*, and of the other moiety from and after

**GIFT PER CAPITA OR PER STIRPES**—*continued.*

the death of *Mary Ann*, in trust to pay, transfer, and assign the same unto and amongst all the children of *Margaret* living at her decease, and the issue then living of any children of hers who should have died in her lifetime, and all the children of *Mary Ann* who should be living at her decease, and the issue then living of any children of hers who should have died in her lifetime, to be equally divided between or among them if more than one, and if there should be but one such child and no issue of any deceased child, or no such child and only one grandchild or such other issue, then the whole to such one child, grandchild, or other issue; the issue of a deceased child taking their parent's share:—*Held* (affirming the decision of *Bacon, V.C.*), that the full and elaborate language of the will, which clearly imputed a distribution of the whole fund *per capita* among the children of both daughters, could not be controlled on the ground of the inconvenience of keeping a moiety of the fund in suspense from the death of one daughter till the death of the other, though in some cases, where the language was very concise and obscure, the Court had held the share of each of the tenants for life divisible on his death among his own children exclusively. *SWABEY v. GOLDIE* [380]

**GIFT TO ATTESTING WITNESS** - - - - - 234  
See REPUBLICATION OF WILL.

**GIFT TO LAWFUL ISSUE**—*Gift after Life Interest—Class to take—Period of Gestation—Marriage after Death of Life Tenant.*] A testator gave his residuary real and personal estate to trustees on trust to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the other half, to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:—*Held*, that the children and remoter issue of the son living at his death took together as joint tenants.—One of the son's daughters, who was unmarried at his death, married ten days afterwards, and had a child born six months after her marriage:—*Held*, that inasmuch as the child, though born within the period of gestation after the son's death, could have had no legitimate existence then, it was not within the class entitled to take. *In re CORLASS* - - - - - 460

**GLEBE**—Sale to railway company—Reinvestment of purchase-money - - - - - 477  
See REINVESTMENT OF PURCHASE-MONEY. 2.

**GRANDCHILDREN**—Illegitimate - - - - - 282  
See ILLEGITIMATE CHILDREN. 1.

**HIGHER OR LOWER SCALE**—Costs—Taxation  
See TAXATION OF COSTS. 1. [111]

**HIGHWAY**—Obstruction of - - - - - 220  
See OBSTRUCTION OF HIGHWAY.

**HIRED PROPERTY**—Bankruptcy—Order and disposition - - - - - 501, 503, n.  
See ORDER AND DISPOSITION. 2, 3.

**HOSPITAL**—Lease by—Covenant to renew 447  
See COVENANT FOR RENEWAL.



**HOTCHPOT CLAUSE**—Life and reversionary interests - - - 217  
See EXCESSIVE APPOINTMENT.

**HUSBAND AND WIFE**—Divorced husband—Rights of - - - 563  
See DIVORCED HUSBAND.

— Policy of insurance of wife—Novation 334  
See NOVATION.

— Restraint of marriage—Second marriage of man - - - 399  
See RESTRAINT OF MARRIAGE.

**ILLEGAL AGREEMENT**—Solicitor—Costs 573  
See CHAMPERTY.

**ILLEGAL POLICY**—Policy effected by Father on his Son's Life—Title to Policy Money—14 Geo. 3, c. 48—*Advancement*.] A father effected a policy in the name and on the life of his son, in which he had no insurable interest, under circumstances which satisfied the Court that he intended it for his own benefit. The son died intestate and the father took out administration to his estate, and the insurance company paid the money assured by the policy to him:—*Held* (affirming the decision of *Bacon, V.C.*), that although as between the insurer and the company the policy was illegal and void under the 14 Geo. 3, c. 48, yet, as between the father and the estate of the son, the father was entitled to retain the money for his own benefit. *WORTHINGTON v. CURTIS* - - - 419

**ILLEGITIMATE CHILDREN**—Will—Bequest by a Grandfather—Daughter—Reputation.] A testator, in 1839, gave property to trustees in trust to pay the income to his "daughter A., the wife of J. H.," for life, and to divide the principal between all the children of his daughter A. when they should attain twenty-one in equal shares, and in case all the children of his daughter A. should die under twenty-one without issue there was a gift over in favour of a son. For some time prior to the date of the will and the death of the testator in 1840, J. H. and the daughter A. were living together as man and wife at B., where the testator resided until within a few months of his death. They were married in 1845. Three children were born before the marriage—one before the testator's will and two after his death. One child was born after the marriage:—*Held*, that the legitimate child only was entitled to the bequest.—*Occleston v. Fullalove* (Law Rep. 9 Ch. 147) and *Dorin v. Dorin* (Law Rep. 7 H. L. 568) discussed. *In re AYLES' TRUSTS* [282

2. — Will—Bequest after Death of Widow to "all my Daughters" who shall attain Twenty-one or marry—Death of Testator, leaving infant illegitimate Daughters only—Designation held sufficient.] Testator bequeathed residuary personal estate after the death of his wife, to "all and every my daughters, in equal shares, who shall attain the age of twenty-one years, or marry."—At his death he had no legitimate child:—*Held*, that evidence as to the surrounding circumstances was admissible.—It was found that at the date of the will, which was made some two years before the testator's death, he had been married about two years. Prior to the marriage his wife had had three children, daughters, who were now living. All were minors at the testator's death; and they

**ILLEGITIMATE CHILDREN**—*continued*.

had always been acknowledged by the testator, and treated by him, as his children:—*Held*, that the three daughters were entitled under the above bequest. *LAKER v. HORDERN* - - - 644

**IMPLICATION**—Estate tail - - - 410  
See DEVISE IN TAIL.

**INCLOSURE**—Part of highway - - - 220  
See OBSTRUCTION OF HIGHWAY.

**INDEMNITY**—Surety for payment of composition [537  
See SURETY FOR PAYMENT OF COMPOSITION.

**INDIA STOCK**—Investment in - - - 697  
See INVESTMENT OF MONEY IN COURT.

**INDORSEMENT OF WRIT**—Practice—Judicature Act, 1873, s. 25, sub-s. 8—Rules of Court, 1875, Order III, r. 2—Amendment of—Injunction—Receiver.] A Plaintiff should indorse his writ with a claim for an injunction or receiver when the obtaining of either is a substantial object of his action. *COLEBOURNE v. COLEBOURNE* - - - 690

2. — Practice—Judicature Acts—Administration of Real and Personal Estate—Creditor's Action for—Action by single Creditor—Rules of Court, 1875, Order XVI, r. 9—Appendix A., Part 2, s. 1.] A single creditor can have administration of the real and personal estate of his deceased debtor without suing on behalf of "all other the creditors," and he should indorse his writ with a claim as a creditor simply. *COOPER v. BLISSETT* [691

**INFANT**—Consent to taking evidence by affidavit - - - 604  
See EVIDENCE BY AFFIDAVIT. 2.

— Maintenance - - - 226, 232  
See MAINTENANCE OF CHILDREN. 1, 2.

— Real estate—Conversion - - - 588  
See CONVERSION. 2.

**INJUNCTION**—Application by Defendant - 600  
See RECEIVER. 5.

— Bankruptcy—Mortgagee - - - 557  
See INJUNCTION IN BANKRUPTCY.

— Claim for—Indorsement - - - 690  
See INDORSEMENT OF WRIT. 1.

— Damage—Interference with privacy - 673  
See COVENANT NOT TO BUILD.

— Execution creditor—Annulled bankruptcy [177  
See EXECUTION CREDITOR.

**INJUNCTION IN BANKRUPTCY**—Jurisdiction—Judicature Act, 1873, s. 24, sub-s. 5—Judicature Act, 1875, s. 9—Creditor holding Security.] The power of the Court of Bankruptcy to restrain suits in other Courts by injunction is untouched by the *Judicature Act*, 1873, s. 24, sub-s. 5, and remains as before the passing of the Act.—An order was made in the London Court of Bankruptcy restraining an equitable mortgagee of certain property of a bankrupt from proceeding in a foreclosure suit against the trustee, and ordering him to give up the deed to the trustee, and concur with him in selling the property; and that on completion of the purchase the sum claimed by the mortgagee should be paid into the Court of Bankruptcy. On appeal the

**INJUNCTION IN BANKRUPTCY**—*continued.*

Court varied the order, directing that the mortgagee should not give up the deed till payment into the Court of Bankruptcy of the amount claimed by the mortgagee. *Ex parte DITTON. In re Woods* - - - - - 557

**INSOLVENCY**—Settlor—Voluntary settlement  
See FRAUDULENT CONVEYANCE. [636

—Test of—Life insurance company - 466  
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**INSURABLE INTEREST**—Life policy - 419  
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**INSURANCE COMPANY**—Novation - 334  
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—Power to transfer liabilities—Rights of policy-holder - 307, 326  
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**INSURANCE**—Life—Illegality - 419  
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**INTERROGATORIES**—Service of, out of jurisdiction - 277  
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**INTERVAL BETWEEN TWENTY-ONE AND TWENTY-FIVE** - 226  
See MAINTENANCE OF CHILDREN. 1.

**INTESTACY**—Domicil *de facto* and *de jure* 257  
See DOMICIL.

—Gift over on - 229  
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—Trustee of leaseholds—Trustee Act - 46  
See TRUSTEE ACT.

**INVESTMENT BY SOLICITOR**—*Solicitor's Liability—Improper Investment—Payment out of Solicitor's Estate—Right of Solicitor to Benefit of Security—Right of subsequent Incumbrancers.* A solicitor invested the money of one of his clients without his knowledge on an improper mortgage security. The client, believing the security to be insufficient, proved against the estate of a partner of the solicitor, which was being administered in Chancery, for the whole amount of the debt, and, under a compromise, received a dividend out of the estate. Afterwards it turned out that the security was sufficient to pay the client in full.—*Held* (reversing the decision of *Hall, V.C.*), that the dividend must be repaid to the solicitor's estate, and did not enure for the benefit of the subsequent incumbrancers on the mortgaged property. *SAWYER v. GOODWIN* - - - 351

**INVESTMENT OF MONEY IN COURT**—*Railway Parliamentary Deposit—Investment in India Stock—9 Vict. c. 20, s. 4—Lands Clauses Consolidation Act, 1845, s. 70.* Although *India Stock* is not one of the securities mentioned in the statute 9 Vict. c. 20, s. 4, or in the *Lands Clauses Consolidation Act, 1845, s. 70*, the Court will allow railway parliamentary deposits to be invested in that stock.—*In re Fryer's Settlement* (Law Rep. 20 Eq. 468) followed, and *Ex parte Great Northern Railway Company* (Law Rep. 9 Eq. 274) not followed. *In re SOUTHWOLD RAILWAY COMPANY'S BILL. Ex parte DEPOSITORS* - - - 697

**ISSUE**—To try custom—Bankruptcy - 501  
See ORDER AND DISPOSITION. 2.

**JOINDER OF ACTIONS**—*Practice—Rules of Court, 1875, Order XVII., r. 2—Cause of Action—Action for the Recovery of Land.* An action "to establish title to land" is an action "for the recovery of land" so as to require the leave of the Court under the Rules of Court, Order XVII., rule 2, for its joinder with another cause of action.—An action for the administration of personal estate may be joined with an action to establish title to real estate where the Plaintiff claims both estates under a common gift in the same will. *WHETSTONE v. DEWIS* - - - - - 99

**JOINT AND SEPARATE ESTATES**—*Bankruptcy Partnership.* *D.* carried on business in partnership for a term with *W.* and *W. Jun.*, under articles providing that *D.* should be a partner in the profits, but not in the capital, and should not be required to bring in any capital. After allowing interest at £5 per cent. on the capital, which belonged solely to *W.*, the net profits were to be divided half-yearly in certain shares. At the expiration of the term *D.*'s interest in the concern was to cease. If *D.* died during the term his representatives were to receive nothing more than a proportionate part of his share of the profits of the current half year for the period up to his decease, such proportionate part to be ascertained, not by a fresh stock-taking, but according to the average of the last two preceding half-yearly stock-takings. *D.* died. Afterwards *W.* died, and the business was carried on by *W. Jun.*, who was also executor of *W.*, and who afterwards went into liquidation. There were at this time assets existing in specie which belonged to the business during the partnership between the three:—*Held*, that on the construction of the articles, *D.*'s right to be indemnified out of the assets against the debts of the firm had not been taken away; that the assets remaining in specie were therefore primarily applicable to payment of the joint debts of *D.*, *W.*, and *W. Jun.*, and that those joint creditors, therefore, could not come against the separate estate of *W. Jun.* till his separate creditors had been paid in full.—*Ex parte Morley* (Law Rep. 8 Ch. 1026) followed.—*In re Simpson* (Law Rep. 9 Ch. 572) distinguished. *Ex parte DEAR. In re WHITE* - - - - - 514

**JOINT AND SEVERAL LIABILITY**—*Partnership Agreement as to Share of deceased Partner.* By an agreement between *A.*, *B.*, *C.*, and *D.*, four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, it was agreed between and by *A.*, *B.*, *C.*, and *D.*, that in case of either of them retiring from the co-partnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said co-partnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any



**JOINT AND SEVERAL LIABILITY**—*continued.*

additional capital (if any) should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:—*Held* (affirming the decision of the Master of the Rolls), that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability, which remained joint and several.—*Wilmer v. Currey* (2 De G. & Sm. 347) considered. *BERESFORD v. BROWNING* - - - - 30

**JOINT TENANT**—Gift to lawful issue - 460  
See GIFT TO LAWFUL ISSUE.

**JUDGMENT**—Against one of two Defendants—  
See MOTION FOR JUDGMENT. 3. [696

— Motion for - - - 643, 692, 696  
See MOTION FOR JUDGMENT. 1, 2, 3.

— To be dealt with as Court of Chancery shall direct - - - - 9  
See LEAVE TO ISSUE EXECUTION.

**JURISDICTION**—Annulment of bankruptcy—  
Execution creditor - - - 177  
See EXECUTION CREDITOR.

— Bankruptcy—Injunction against suits in other Courts—New practice - 557  
See INJUNCTION IN BANKRUPTCY.

— Court of Appeal - - - 11, 12  
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— Foreign debtor—Debtor's summons - 509  
See DEBTOR'S SUMMONS. 2.

— Winding up—Chancery Division - 253  
See STAYING PROCEEDINGS. 4.

**LANDLORD AND TENANT**—Distress after commencement of liquidation - - 285  
See DISTRESS AFTER BANKRUPTCY.

**LAPSE**—Excessive appointment - - 217  
See EXCESSIVE APPOINTMENT.

**LAWFUL ISSUE**—Gift to - - - 460  
See GIFT TO LAWFUL ISSUE.

**LEASE**—Renewal—Covenant—Hospital - 447  
See COVENANT FOR RENEWAL.

**LEAVE TO ISSUE EXECUTION**—*Practice—Judgment to be dealt with as the Court shall direct.* A Defendant in a suit in Chancery gave judgment in an action at law "to be dealt with as the Court shall direct":—*Held*, that although liberty to enforce the judgment would not generally be given until the merits of the case were disposed of, the Court was not precluded from allowing execution to issue at an earlier stage of the cause. *HODGES v. FINCHAM* - - - - 9

**LEGAL ESTATE**—Bare trustee—Vendor and Purchaser Act—Land Transfer Act 279  
See BARE TRUSTEE.

— Mortgaged estate - - - 214  
See DEVISE OF MORTGAGED ESTATES.

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See DEVISE IN TAIL. [410

**LEGATEE**—Pecuniary—Marshalling - 626  
See MARSHALLING.

**LIABILITY**—Director—Contract for his own benefit - - - 580  
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— Official liquidator - - - 130  
See OFFICIAL LIQUIDATOR.

— Sequestration—Dilapidations - - 438  
See SEQUESTRATION.

— Transfer of - - - 307, 326  
See AMALGAMATION OF COMPANIES. 1, 2.

— Transfer to escape - - - 576  
See TRANSFER OF SHARES.

**LIEN**—Agent—Acceptance of bills—Goods in his hands - - - 631  
See SECURITIES FOR BILLS OF EXCHANGE.

**LIFE INSURANCE**—Assignment of policy—Payment of money into Court - 611  
See TRUSTEE RELIEF ACT.

— Illegality—14 Geo. 3, c. 48 - - 419  
See ILLEGAL POLICY.

**LIFE INSURANCE COMPANY**—Test of insolvency - - - 466  
See PROVISIONAL LIQUIDATOR.

**LIQUIDATION BY ARRANGEMENT**—Distress after commencement of - - 285  
See DISTRESS AFTER BANKRUPTCY.

— Order and disposition - - - 521  
See ORDER AND DISPOSITION. 4.

— Registration of resolutions - - 699  
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— Second petition—Rights of creditors under first - - - 521  
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— Statement of debts - - - 699  
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**LIQUIDATOR**—Provisional - - - 466  
See PROVISIONAL LIQUIDATOR.

**LORD MAYOR'S COURT**—Receiver appointed in Chancery suit - - - 4  
See RECEIVER. 1.

**LUNACY**—Lands Clauses Act—Reinvestment of purchase-money - - - 28  
See REINVESTMENT OF PURCHASE-MONEY. 1.

— Lands Clauses Act—Rent charge - 409  
See COMPENSATION UNDER LANDS CLAUSES ACT.

**MAINTENANCE OF CHILDREN**—*Interval between Twenty-one and Twenty-five—Advancement or Benefit of Child—Education—Contingent Interest*—23 & 24 Vict. c. 145, s. 26.] A testator directed his trustees to pay to his widow the sum of £100 per annum for the maintenance and support of each of his children until he or she should attain twenty-one, with power to increase or decrease such allowance; and he empowered his trustees, with the consent of his widow, to advance any sums not exceeding in the whole one-fourth of the presumptive share of any child for his or her placing out or advancement in life, or otherwise for his or her benefit; the residue to be held in trust for all the children of the testator who being sons should attain twenty-one, or being daughters should attain twenty-five or marry, without any provision for the maintenance of un-

**MAINTENANCE OF CHILDREN**—*continued.*

married daughters during the interval.—On a petition by the trustees, under *Lord St. Leonard's Act*, for the opinion of the Court:—*Held*, that the trustees had no power either under 23 & 24 Vict. c. 145, s. 26, or by way of interest on their contingent shares, to allow maintenance to unmarried daughters during the interval; but that the advancement clause enabled them to advance the necessary sums of money for the purpose.—*Semble*, if the testator's estate were being administered by the Court interest on their contingent shares would have been given by way of maintenance:—*Held*, also, that the trustees would be justified in increasing the allowance for infant daughters of the testator so as to meet the expenses of education, as included in maintenance and support. *In re BREED'S WILL* - - - - - 226

2. — *Infant—Contingent Interest*—23 & 24 Vict. c. 145, s. 26.] Trustees may, under 23 & 24 Vict. c. 145, s. 26, apply for or towards the maintenance of an infant the income of property held on trust for the infant contingently on attaining the age of twenty-one years.—Where a fund was bequeathed upon trust for all the children of *A.* who should attain twenty-one in equal shares, and if there should be but one such child, then for that child, and *A.* died leaving one infant child:—*Held*, that the income of the fund might be applied in the maintenance of the child. *In re COTTON* - - - - - 232

**MAJORITY** — Meeting of shareholders — Companies Arrangement Act - - - 251  
See COMPANIES ARRANGEMENT ACT.

**MARRIAGE** — Dissolution of — Effect on husband's rights - - - - - 563  
See DIVORCED HUSBAND.

— Restraint of — Second marriage of man 399  
See RESTRAINT OF MARRIAGE.

**MARSHALLING** — Administration — Costs — Deficient Estate — Residuary Devise — Pecuniary Legatee.] The decision of the Court of Appeal in *Lancefield v. Iggulden* (Law Rep. 10 Ch. 136) affirms *Hensman v. Fryer* (Law Rep. 3 Ch. 420) only on the first point decided by it; and it is therefore still the rule in administering assets that when the residuary personal estate is insufficient to pay the costs of a suit, the deficiency must be made up by the pecuniary legatees in priority to the residuary devisees. *TOMKINS v. COLTHURST* - - - - - 626

**MEETING** — Shareholders — Adjournment - 13  
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— Shareholders — Companies Arrangement Act — Majority - - - - - 251  
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**MEMORANDUM AS TO NEW PRACTICE** — 38 & 39 Vict. c. 77 — Costs of Appeal (Order LV.) — Transfers (Order LI.) — Appeal from Interlocutory Order (sect. 12.)] MEMORANDUM - - - 41

**MEMORANDUM OF ASSOCIATION** — Subscriber of [247, 620  
See SUBSCRIBER OF MEMORANDUM. 1, 2.

**MISDESCRIPTION** — "Gentleman" — Transfer of shares - - - - - 576  
See TRANSFER OF SHARES.

**MISREPRESENTATION IN PROSPECTUS** — Companies Act, 1867, s. 38 — Promoter — Previous Contract — Omission from Prospectus — Fraud — Remedy — Action — Removal of Name.] *M.* agreed with the owner of a patent to purchase the patent for £65,000, to be paid partly in cash and partly in the shares of a company to be formed by *M.* Three months afterwards *M.* made an agreement with a trustee for an intended company to sell the patent to the trustee for £125,000, payable partly in cash and partly in shares in the company. Shortly afterwards the company was formed, *M.* being a director. A prospectus was issued which did not mention the first agreement for purchase:—*Held*, by *James, L.J.*, and *Bramwell, B.*, that, under the circumstances, *M.* was not, when he made the first agreement with the patentee, a promoter of the company, and that the omission to specify that agreement was not fraudulent, either under the general law or under 30 & 31 Vict. c. 131, s. 38; and that where the omission to specify any agreement renders the prospectus fraudulent under that statute, the shareholder has his remedy against the person making the omission, but cannot therefore have his name removed from the list of shareholders:—*Held*, by *Mellish, L.J.*, that as *M.*, after he made the first agreement, became a promoter of the company, he ought to have disclosed that agreement to the company; but that the omission did not, under the statute, make the prospectus fraudulent on the part of the company, and that the shareholder therefore could not have his name removed:—*Held*, by *Brett, J.*, that the omission to disclose the first agreement was not a fraud independently of the statute, but that the omission to disclose a contract formerly made by a promoter, and likely to affect the mind of a subscriber for shares, was fraudulent under the statute; and that the remedy of the shareholder was to have her name removed from the list of shareholders.—Order of *Bacon, V.C.*, affirmed. *In re COAL ECONOMISING GAS COMPANY. GOVER'S CASE* - - - 182

**MISTAKE IN SETTLEMENT** — Construction — Settlement — Limitation to Children — Omission supplied.] By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees in trust for the wife for life, and after her decease upon trust for all and every the child and children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, *his or her* executors and administrators. There followed a clause directing that the trustees should, during the minority of each of the said children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of every such child for or towards *his or her* maintenance and education until *his or her* share should become vested, or *he or she* should previously die:—*Held* (reversing the decision of the Master of the Rolls), that daughters who attained twenty one were entitled to share in the fund.—*Semble*, daughters would not acquire a vested interest till they attained twenty-one. *In re DANIEL'S SETTLEMENT TRUSTS* [375



**MISTAKE IN WILL**—*Falsu Demonstratio*—*Acreage* “more or less”—*Parcels*.] Testatrix, in exercise of a power in a marriage settlement, by will, dated in 1845, devised “All that and those messuage or tenement houses, buildings, farm and lands, called *H.* . . . situate in the parish of *L.*, containing by estimation eighty acres more or less . . . now in the occupation of *J. C.* or his assigns,” to the use of the same *J. C.*, his heirs and assigns. —At the date of the will, a farm called *H.* was in the occupation of *J. C.* It contained nearly 175 acres, of which about eighty-nine were freehold in the parish of *L.*, about sixty-six were copyhold in the parish of *L.*, and the remainder were copyhold in an adjoining parish:—*Held*, that not only the eighty-nine acres of freehold in the parish of *L.*, but the whole of *H.* farm, passed by the devise. —Testatrix also devised “All that messuage or tenement, barn and lands thereunto belonging, situate in the parish of *B.* . . .” called by the name of “*Claggetts and Sievelands*,” to the use of *J. W.*, his heirs and assigns.—This description was identical in terms with a description in a schedule to the settlement; and it was followed in the same schedule by descriptions of six other pieces of land. At the date of the will, and for many years before and after, all seven pieces of land were in one occupation, and known as “*Clagget Farm*”:—*Held*, that all seven parcels passed by the devise. —Testatrix also devised “All that capital messuage . . . and farmhouse, with the barns, buildings . . . gardens, orchards, lands . . . woods, wood-grounds, and appurtenances . . . commonly called *T.* . . . situate in the parish of *E. G.*, in the occupation of *A. B.*, his assigns or under-tenants,” to the use of the same *A. B.*, his heirs and assigns.—At the date of the will, *T.* farm was situate in two parishes, *E. G.* and *W.* The farm-house of *T.* was in *W.* parish, and part of the farm buildings was in the parish of *E. G.* All were then in the occupation of *A. B.*, except some woods which were kept in hand by the landlord, and never were in the occupation of *A. B.*:—*Held*, that the farm-house, buildings, and all the lands of *T.* farm (except the woodlands, which fell into the residue), passed by the devise. *WITFIELD v. LANGDALE* - 61

**MORTGAGE**—Bankruptcy—Injunction against mortgagee - 557

See INJUNCTION IN BANKRUPTCY.

— Building society - 481

See BUILDING SOCIETY.

— Consolidation of - 491

See CONSOLIDATION OF MORTGAGES.

— Devise of mortgaged estates—General devise [214

See DEVISE OF MORTGAGED ESTATES.

— Investment by solicitor—Payment out of solicitor's estate - 351

See INVESTMENT BY SOLICITOR.

— Receiver—Legal and equitable mortgage [273

See RECEIVER. 2.

**MOTION FOR ACCOUNTS**—*Practice*—*Rules of Court*, 1875, Order XXXIII, and Order XL, r. 11.] In a suit to take the accounts of a partnership the Defendants by their answer, filed before the 1st of November, 1875, admitted the partnership, and that they had not accounted; and alleged that the Plaintiff had not accounted, and that

**MOTION FOR ACCOUNTS**—*continued*.

moneys were due from him to them. The Plaintiff joined issue, and moved under the new practice, before the hearing, under the Rules of Court, 1875, Order XXXIII, rule 11 (upon affidavit of service), that the accounts of the partnership dealings might be taken:—*Held*, that he was entitled to the order under Order XXXIII. or Order XL, rule 11, and order made accordingly. *TURQUAND v. WILSON* - 85

**MOTION FOR JUDGMENT**—*Practice*—*Rules of Court*, 1875, Order XL, r. 11—*Order on Motion for Account and Delivery of Securities*.] Order on motion by Plaintiffs on notice, for an account and delivery of securities relating to the testator's estate, of which they were trustees, admitted by the Defendant in his answer to be in his possession as agent for the Plaintiffs. *RUMSEY v. READE* 643

2. — *Practice*—*Judicature Acts*—*Rules of Court*, 1875, Order XL, r. 11—*Admissions in Pleadings*—*Order on Motion*.] Form of order made on motion for judgment under Order XL, rule 11, when the further hearing of the action is adjourned. *BENNETT v. MOORE* - 692

3. — *Practice*—*Judicature Acts*—*Admissions in Pleadings*—*Judgment against one of two Defendants*—*Rules of Court*, 1875, Order XIX, r. 17; Order XL, r. 11.] A statement of defence was delivered in an action brought against a husband and wife upon a joint and several promissory note given by them, which, purporting to be the defence of both Defendants, raised no defence as regarded the husband:—*Held*, upon motion for judgment, that the Plaintiffs were entitled under Order XL, rule 11, to final judgment against the husband without waiting for the determination of the case against the wife. *JENKINS v. DAVIES* - 696

**NAME AND ARMS CLAUSE**—*Will*—*Use of Surname*.] Under a name and arms proviso requiring a devisee to take the testator's surname:—*Held*, that adding the testator's surname before his own was not a compliance by the devisee, but that adding the testator's surname after his own was so. *D'EYNCOURT v. GREGORY* - 441

**NATURALIZATION**—*France*—*Code Napoléon*, Art. 13 - 257

See DOMICIL.

**NOTES**—Shorthand writer—Costs - 698

See TAXATION OF COSTS. 2.

**NOTICE**—Action—Claim by Defendant against third party - 176

See NOTICE OF ACTION TO THIRD PARTY.

— Adding fresh evidence—Appeal - 562

See ADDING FRESH EVIDENCE.

— Application for attachment - 445

See ARREST OF DEBTOR.

— Meeting of shareholders—Extraordinary resolution - 38

See RESOLUTION TO WIND UP.

— Mortgage—Subsequent mortgagees - 491

See CONSOLIDATION OF MORTGAGES.

— Motion—Filing affidavits—Old and new practice - 89

See PROSECUTION OF PENDING PROCEEDINGS. 2.

**NOTICE—continued.**

— Subsequent trading—Trustee—Liquidation  
See ORDER AND DISPOSITION. 4. [521

**NOTICE OF ACTION TO THIRD PARTY—Leave to serve—Judicature Act, 1873, s. 24, sub-s. 3—Rules of Court, 1875, Order XVI., r. 18.]** Where the Plaintiffs and Defendants allege that a suit is occasioned by the conduct of a third party, the Court will give leave that he may be served with notice of the suit, so as to enable the Court to grant relief against him. *TRELEVEN v. BRAY* 176

**NOVATION—Assurance Company—Policy-holder.]** Mrs. C., while a single woman, insured her life with the *W. Society*. The *W. Society*, without authority, assigned over its business to the *B. N. Society*. A circular was sent to the policy-holders stating that the proprietors of the *W. Society* had agreed with the *B. N. Society* to unite the business of the two companies; that the terms and conditions of the policies of the *W. Society* would remain unaltered; that premiums should be paid to the manager of the *B. N. Society*, but that policy-holders who had paid premiums through an agent might continue to pay them through the same agent; that the policy-holders were guaranteed by the *B. N. Society* for all claims under their policies, but that if they chose they could have their policies indorsed, or new policies granted by the *B. N. Society*. Mrs. C. at this time was married. After this the *B. N. Society* made over its business to the *E. Society*. Mrs. C. never had her policy indorsed or any new policy granted, and she went on paying her premiums through the same local agent as before. Receipts were given her headed at first "*B. N. Society*," with which is united the business of the *W. Society*," afterwards "*B. N. Society* in union with the *E. Society*," and ultimately "*E. Society*" simply:—*Held*, that no communication had been made to Mrs. C. calculated to convey to her that she was to pay her premium with any different result, or on any different contract from that on which she had theretofore paid it, and that she could not be taken to have intended to adopt the liability of another society in lieu of that of the *W. Society*:—*Semble*, inasmuch as the case was one of a contract for a reversionary payment to a married woman, such an adoption could not have been effectually made. *In re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS AND WELLINGTON REVERSIONARY ANNUITY AND LIFE ASSURANCE SOCIETY. CONQUEST'S CASE* - - - 334

**OBSTRUCTION OF HIGHWAY—Inclosure of Portions—Duties of Surveyors of Highways—Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 69, 70.]** In a suit to restrain surveyors of highways from removing a wall inclosing a piece of ground alleged to form part of a highway, the High Court of Justice has jurisdiction to decide whether the land does or does not form part of the highway; and if the Court comes to the conclusion that it does form part of the highway, an injunction to prevent the removal of the inclosure cannot be granted.—*Semble*, a wall inclosing part of a street is an obstruction to the "safe and convenient passage along" the street within the meaning of the *Towns Improvement Clauses Act, 1847*, whatever may be the width

**OBSTRUCTION OF HIGHWAY—continued.**

of the uninclosed portion of the street.—*Semble*, after it has been judicially determined that a particular object is an obstruction to a public highway, the surveyors of highways may remove the obstruction. *BAGSHAW v. BUXTON LOCAL BOARD OF HEALTH* - - - 220

**OBTAINING AND PLEDGING GOODS—Fraudulent debtor** - - - 151  
See PROSECUTION OF BANKRUPT.

**OFFICIAL LIQUIDATOR—Winding-up—Costs of Liquidation—Personal Liability of Official Liquidator to the Solicitor—Companies Act, 1862, ss. 97, 110.]** The solicitor appointed by the official liquidator has no claim against the official liquidator personally for the costs of the winding-up, even though an order has been made on the application of the official liquidator that the costs should be taxed and paid by him to the solicitor. *In re ANGLO-MORAVIAN HUNGARIAN JUNCTION RAILWAY COMPANY. Ex parte WATKIN* - 130

**ORDER OF DISCHARGE—After-acquired property** - - - 478  
See CLOSE OF BANKRUPTCY.

**ORDER—On motion on admission in pleadings**  
[643, 692, 696  
See MOTION FOR JUDGMENT, 1, 2, 3.

**ORDER AND DISPOSITION—Reputed Ownership—Post-nuptial Settlement of Furniture—Costs of Appeal—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 15 (sub-s. 5), 91, 92.]** A husband and wife, at a time when the wife was under age, executed a deed which purported to convey freehold property of the wife to a purchaser for £500. The deed was not acknowledged by the wife. The husband received the £500. The purchaser afterwards contracted to sell the property, and his sub-purchaser required the concurrence of the wife in the conveyance to him. The wife, who was then of age, refused to concur, unless the husband would execute a bill of sale of his furniture to a trustee for her, to secure the payment of £425 for her separate use. This was done by the husband; and she then executed the conveyance to the sub-purchaser. The bill of sale was registered. Possession of the furniture was given to the trustee by delivering to him a silver fork in the name of the whole, and the keys of the house where the furniture was. But the furniture remained, until the husband filed a liquidation petition, in the house which was occupied by him and his wife, and it was used by them:—*Held*, that the execution of the bill of sale amounted to a purchase of the wife's concurrence in the conveyance; that the possession was consistent with the terms of the deed; and that the wife's trustee was entitled to the furniture as against the trustee under the liquidation. *Ex parte COX. In re REED* 302

2. — *Bankruptcy—Hired Property—Custom—Appeal—Issue.]* Where a custom of holding certain goods on hire is relied on to take the goods out of the order and disposition of a bankrupt, the custom must be one which the ordinary creditors of the bankrupt may be reasonably presumed to have known.—Such custom may be proved either by reported cases, or by evidence of the custom as on a question of fact.—On the bankruptcy of an hotel-keeper a custom was alleged of hiring furniture



**ORDER AND DISPOSITION**—*continued.*

for hotels. The custom was on slight, but uncontradicted, evidence considered by the Chief Judge (overruling the decision of a County Court Judge) to be sufficiently established, and on appeal, the Appellant having declined an offer to have the custom tried by a jury, the appeal was dismissed. *Ex parte POWELL. In re MATTHEWS* - 501

3. — *Bankruptcy—Hiring Property—Cab-owner—Coach-builder.* Where goods are in the apparent possession of a bankrupt, and the real owner sets up a custom for letting such goods on hire, the custom must be clearly proved to be known to persons in the same trade, and to others who are likely to become their creditors. An alleged custom for coach-builders to supply cab-owners with cabs on the system of their paying a rent for them with the option of purchasing, held not to be sufficiently proved. *In re HILL* 503, n.

4. — *Liquidation Petition—Property acquired by undischarged Debtor—Second Liquidation Petition—Rights of Creditors under First Petition—Evidence of Knowledge and Consent—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 15, 26, 54, 125.]* The creditors of a trader who had filed a liquidation petition resolved that he should have his discharge when they had received 2s. in the pound on their debts. The estate realized only half that sum. The debtor went into business again and contracted new debts, and afterwards filed a second liquidation petition:—*Held*, by Bacon, C.J., and by the Court of Appeal, that, in the absence of positive evidence that the trustee or the creditors under the first petition were aware of the subsequent trading, they were entitled in priority to the new creditors to the assets acquired by the debtor in the course of his trading, to the extent necessary to make up the 2s. in the pound. —It could not be assumed that the old creditors intended, when they passed their resolution, that the debtor should trade again in order to be able to pay the 2s. in the pound.—*In re Rawbone's Trust* (3 K. & J. 476) commented on. *Ex parte FORD. In re CAUGHEY* - 521

5. — *Bankruptcy—Equitable Assignment of Goods—Claim of Possession by Creditor.* A debtor on the eve of insolvency being pressed for payment by a creditor, wrote a letter purporting to transfer to him 500 tons of coals lying at his wharf, the proceeds of which he agreed to hand over to the creditor till his debt was discharged. —On the following day the debtor filed a petition for liquidation. The next day the creditor, not having heard of the filing of the petition, but suspecting that the debtor was insolvent, made a formal demand for the coals, and sent a man to take possession of them, who was forcibly ejected by the debtor. The letter was registered under the *Bills of Sale Act*, and a resolution was afterwards passed by the creditors agreeing to a liquidation:—*Held*, that the letter operated as an equitable assignment of the coals, and although it was intended by the parties that the coals should remain in the possession of the debtor, yet the creditor had a right to demand possession of them if he suspected the insolvency of the debtor; and that when that was done they ceased to be in the order and disposition of the debtor with the consent of the true owner. *Ex parte MONTAGU. In re O'BRIEN* - 554

**PAID-UP SHARES**—Director—Corrupt bargain  
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**PARCELS**—Description of - - - 61  
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**PARISHIONER**—Meaning of word—*Bona fides*  
*See ELECTION TO CHRIST'S HOSPITAL.* [160]

**PARTIES**—Cross-examination on accounts - 473  
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— Petition under Settled Estates Act - 426  
*See SETTLED ESTATES ACT.*

**PARTITION SUIT**—*Partition Act, 1868—Decree in County Court—Sale before further Consideration, notwithstanding Inquiry as to one of the Parties interested.* By a decree for administration in a County Court a sale of real estate devised to A. and six other persons parties to the suit was ordered, and an inquiry was directed before the Registrar of the Court as to A., who had not been heard of for many years. On an affidavit being produced to the Registrar shewing that A. had not been heard of for seventeen years, the sale was effected without any certificate as to the result of the inquiry being made. The sale produced more than £500, and the cause was transferred to the Court of Chancery. On motion by the purchaser to be discharged and to have his costs paid, on the ground that the sale was invalid as having been made before a certificate in answer to the inquiries had been made:—*Held*, that A. must be presumed to be dead without issue; and that, as all parties interested were in fact before the Court at the hearing, and were willing to convey, and a good title could be made independently of the *Partition Act, 1868*, the purchaser was bound to accept such a title, and could not rely upon the technical informality in the decree. *RAWLINSON v. MILLER* - 52

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**PARTNERSHIP**—Assets—Not included in bill of sale—Act of bankruptcy. - - 297  
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**PAYMENT OUT OF COURT**—*Practice—Settled Estates Acts—Sale of Settled Estate—Payment out of Proceeds—Tenant in Tail—Disentailing Deed.* The proceeds of sale of a settled estate sold under the *Leases and Sales of Settled Estates Acts* will not be paid out to a tenant in tail under the settlement unless he has executed a disentailing deed. *In re BROADWOOD'S SETTLED ESTATES* - - 438

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- PROOF**—Bankruptcy—Accommodation bills 137  
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- Winding-up—Secured creditor - - - 48  
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- PROSECUTION OF BANKRUPT**—*Obtaining and Pledging Goods otherwise than in the ordinary way of Business—Debtors Act, 1869, s. 11, sub-ss. 13, 14, 15.* A trader being in insolvent circumstances, purchased goods on credit, and shipped them to *Australia*, and obtained advances by pledging the bills of lading. Within four months afterwards he became bankrupt. In his examination he stated that he could give no account of what had become of the purchase-money:—*Held*, that in the absence of any evidence of the bankrupt having obtained the goods on false representations, his conduct did not constitute an offence under the 14th or 15th sub-sections of the 11th section of the *Debtors Act, 1869*; and an application by the trustee for an order to prosecute him was refused:—*Held*, also, that he had not committed an offence under the 13th sub-section of the same section. *Ex parte BRETT. In re HODGSON* - - - 151
- PROSECUTION OF PENDING PROCEEDINGS**—*Practice—Judicature Act, 1873, s. 22—Pending Cause—Continuance under old Practice.* The Court will not, on an *ex parte* application, direct proceedings in a pending suit to be continued under the old practice. *PERKINS v. SLATER* - - - 83
2. — *Practice—Judicature Act, 1873, s. 22—Pending Cause—Further Proceedings.* In suits pending on the 1st of November, 1875, in which notice of motion has not been given under the old practice, the Plaintiff must, at the time when he would have given such notice, join issue under the new practice, without filing affidavits in support of his case, unless by consent or special leave obtained on motion for the purpose. *ATTORNEY-GENERAL v. WILLSHIRE* - - - 89
3. — *Practice—Judicature Act, 1873, s. 22—Pending Cause—Mode of taking Evidence—Rules of Court, 1875, Order XXXVII, r. 1.* Where, in a pending cause, replication was not filed nor notice of motion for decree given before the 2nd of November, 1875, the Court has not the power, except with the consent of the parties, to direct that the evidence should be taken otherwise than *vivâ voce*. *PATTISON v. WOOLER* - - - 464
- PROSPECTUS OF COMPANY**—Misrepresentation [182  
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- PROVISIONAL LIQUIDATOR**—*Companies Act, 1862, s. 85—Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61)—Ex parte Application.* After the presentation of a petition for winding up a life assurance company, and before answering the inquiry directed by the fiat pursuant to the *Life Assurance Companies Act, 1870, s. 21*, whether a *primâ facie* case for entertaining the petition has been established, the Court will not appoint a provisional liquidator on the *ex parte* application of the Petitioner.—Tests of insolvency as applied to a life assurance company considered. *In re LONDON AND MANCHESTER INDUSTRIAL ASSOCIATION* - - - 466
- PUBLIC EXAMINATION OF BANKRUPT**—*Bankruptcy—Adjournment—Written Requisitions—Bankruptcy Act, 1869, ss. 19, 96.* A trustee in bankruptcy examined the bankrupt at his public examination concerning certain alleged fraudulent transactions, on which he had previously examined him in private, but failed to obtain satisfactory explanation. The Registrar, sitting as Chief Judge, against the wish of the trustee, stopped the public examination, considering that it was a waste of public time, and adjourned it to a future day, ordering the trustee in the meantime to deliver written requisitions to the bankrupt as to the points on which he required information:—*Held*, that even if the Registrar had power to order the trustee to deliver such written requisitions, which (*semble*) he had not, he had not exercised a sound discretion in stopping the examination; and order discharged accordingly. *Ex parte CRUMP. In re HENDREY* - - - 530
- PUBLIC POLICY**—Restraint of marriage—Second marriage of man - - - 399  
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- PURCHASE-MONEY**—*Lands Clauses Act—Reinvestment* - - - 28, 477  
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- QUALIFICATION**—Director—Paid-up shares—  
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- QUESTION OF FACT**—Trial of—Single counsel  
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- RAILWAY COMPANY**—Deposit—Investment in Court—*India Stock* - - - 697  
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- RAILWAY STATION**—Delivery of goods at 101  
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- REAL ESTATE**—Conversion - - - 385, 588  
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- Debts payable out of rents - - - 591  
 See CHARGE OF DEBTS.
- Proceeds of sale of - - - 605  
 See RESIDUARY GIFT.
- RECEIVER**—*Concurrent Suits—Suit in Lord Mayor's Court.* A trader in the City of London against whom proceedings in bankruptcy were pending died insolvent before adjudication.



**RECEIVER—continued.**

leaving all his property to his wife and appointing her his executrix. A creditor immediately filed his bill for a receiver until a personal representative should be constituted. The wife proved the will before a receiver had been appointed, and the creditor thereupon amended his bill, praying administration of the estate and a receiver. On the day on which the amended bill was served a bill for administration was filed by another creditor in the Lord Mayor's Court, a decree taken by consent for administration, and a receiver appointed. The creditor in that suit was a friend of the testator, who had just before the testator's death supported a proposal made by him for a composition with his creditors. Part of the assets was out of the jurisdiction of the Lord Mayor's Court:—*Held* (affirming the decision of *Bacon, V.C.*), that although the Court will not generally interfere with the proceedings of another Court which has power to do complete justice, yet, in the peculiar circumstances of the case, it was right to appoint a receiver in the Chancery suit. *NOTHARD v. PROCTOR* - - - - - 4

2. — *Practice—Legal and equitable Mortgage of same Property—Judicature Act, 1873, s. 25 (8).*] Under the power given by the *Judicature Act, 1873, s. 25 (8)*, to appoint a receiver in all cases in which it shall appear just and convenient, the order made on interlocutory application for the appointment of a receiver was extended to the whole property comprised in the Plaintiff's security, as to part of which he was legal and as to part equitable mortgagee. *PEASE v. FLETCHER* [273

3. — *Practice—Trust Estate—Expectation of Bankruptcy—Appointment before Service of Writ—Form of Order.*] Where bankruptcy and consequent loss to a trust estate is expected, a receiver may be appointed before the service of the writ in an action. Form of order. *In re H.'s ESTATE. H. v. H.* - - - - - 276

4. — *Practice—Execution Creditor—Possession of Sheriff—Appointment of Receiver nominatim.*] Where, on a motion for a receiver, an order is made that a named person on giving security be appointed receiver, the appointment takes effect from the date of the order; and therefore where, after such an order and before the receiver so appointed perfected his securities, certain execution creditors who had not received notice of the appointment put the sheriff in possession of the goods over which the receiver was appointed:—*Held*, that immediately on notice being given of the appointment the sheriff ought to have been withdrawn. *EDWARDS v. EDWARDS* - - - 454

5. — *Practice—Injunction and Receiver—Application by Defendant—Rules of Court, 1875, Order LII., r. 4—Partnership Suit—Appointment of a Partner as Receiver and Manager.*] Under the Rules of Court, 1875, Order LII., rule 4, a Defendant in an action may, before judgment, apply for an injunction and a receiver. The Defendant may do so notwithstanding that the Plaintiff has already served notice of motion for the like purpose; and in such case one order will be made on the two motions, but the conduct of the proceedings will in general be given to the Plaintiff.—The circumstances under which one of the mem-

**RECEIVER—continued.**

bers of a dissolved partnership will be appointed manager and receiver considered. *SARGANT v. READ* - - - - - 600

— Claim for—Indorsement - - - 690  
See INDORSEMENT OF WRIT. 1.

**REDUCTION OF CAPITAL OF COMPANY—**

*Limited Company—Sale of Lands of—Division of Proceeds.*] The Plaintiff and nine other persons formed themselves into a limited company, under the *Companies Acts, 1862 and 1867*, and executed articles of association which empowered the directors, on behalf of the company, to buy and also to sell land, but which contained no regulation authorizing a reduction of capital. At the time of the registration of the company the ten shareholders were the co-owners of lands which they had purchased with moneys subscribed by themselves in equal shares, and after the registration they conveyed these lands to themselves on behalf of the company. There was no other paid-up capital of the company except the lands so conveyed, and certain moneys expended on the improvement thereof, which had also been subscribed by the shareholders in equal shares. The directors afterwards sold a portion of these lands, which they alleged was not required for the purposes of the company, and divided the proceeds among the shareholders in equal shares, paying to nine of the shareholders the amount of their shares therein. The Plaintiff refused to receive his share, and filed his bill against the company and the nine other shareholders:—*Held*, that the division of the purchase-money among the shareholders was *ultra vires* and invalid; and that the nine shareholders must pay back to the company the amounts which they had respectively received. *HOLMES v. NEWCASTLE-UPON-TYNE FREEHOLD ABATTOIR COMPANY* [682

**REGISTRATION—Resolution for liquidation** 699  
See STATEMENT OF DEBTS.

**REINVESTMENT OF PURCHASE-MONEY—**

*Lands Clauses Act, 1845, s. 69—Lunatic.*] Land belonging to a lunatic having been purchased by a railway company under the powers of its Act, an order was made for payment of the purchase-money to the credit of the lunacy, and for its investment to the joint account of the lunatic and the company, without its being first paid into Court under the *Lands Clauses Consolidation Act, 1845, s. 69*.—The application for such an order must not be made in the Lunacy only, but also in the Chancery Division. *In re MILNES (A PERSON OF UNSOUND MIND)* - - - - - 28

2. — *Lands Clauses Act, 1845, s. 69—Glebe—Building Farm-house.*] Part of a fund in Court, the proceeds of sale of a portion of glebe to a railway company, ordered to be paid to the rector towards recouping past outlay in building a farm-house on the glebe. *Ex parte RECTOR OF GAMSTON* - - - - - 477

**RENT—Accumulation of** - - - - - 653  
See ACCUMULATIONS.

— After commencement of liquidation - 285  
See DISTRESS AFTER BANKRUPTCY.

— Undisposed of—Estate tail by implication  
See DEVISE IN TAIL. [410



**RENT-CHARGE**—Purchase of—Lunatic—Lands  
Clauses Act - - - 409  
See COMPENSATION UNDER LANDS CLAUSES  
ACT.

**RENTS AND PROFITS**—Direction to pay debts  
out of - - - 591  
See CHARGE OF DEBTS.

**REPUBLICATION OF WILL**—*Codicil—Gift to attesting Witnesses—Subsequent Codicil referring to Will.*] A codicil, which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil. *Gordon v. Lord Reay* (5 Sim. 274) dissented from and not followed.—A testator made a will (dated before the *Wills Act*), by which he directed his residuary real estate to be sold and the proceeds to be divided) in the events which happened) among twelve persons, of whom *A.* and *B.* were two. He made a first codicil (dated after the *Wills Act*), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. The codicil was attested by *A.* and *B.* He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—*Held*, that the second codicil did not operate as a republication of the first codicil; that the gifts to *A.* and *B.* of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between *A.* and *B.* and the other ten residuary legatees. *BURTON v. NEWBERRY* 234

**REPUGNANT GIFT**—*Absolute Interest in Personal Estate—Limitation over in case of Intestacy.*] A fund was settled in trust for *W.*, the illegitimate daughter of the settlor, for life, and in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers and provisions of the settlement, be undisposed of, or in the events which should happen would but for the proviso be held in trust for the Crown, or belong beneficially to the Crown, then and in every such case the estate, interest, or benefit should belong to and be held in trust for her father for life, and after his death, for her mother. *W.* having died intestate, the Crown claimed the fund:—*Held*, that the fund vested absolutely in *W.* at her death, and that the gift over was repugnant and void; and consequently that the Crown was entitled to the fund. *In re WILCOCKS' SETTLEMENT* - - - 229

**REPUTED OWNERSHIP** 302, 501, 503, n., 521,  
See ORDER AND DISPOSITION. 1—5. [554]

**RESIDENCE**—Place of—Debtor's summons 509  
See DEBTOR'S SUMMONS. 2.

**RESIDUARY DEVISEE**—Marshalling - 626  
See MARSHALLING.

**RESIDUARY GIFT**—*Will—Trust for Sale of Real and Personal Estate—Proceeds of Sale of Real Estate included in Gift of Residuary Personal Estate.*] Testator, by his will, made in 1872, after certain legacies, devised his real estate and bequeathed the residue of his personal estate to trustees upon trust to sell, and to dispose of the net moneys to arise from such real and residuary personal estate

**RESIDUARY GIFT**—*continued.*

(after payment of his debts, funeral and testamentary expenses, and legacies), "according to the trusts thereafter declared concerning the same," with a discretionary power for the trustees to postpone the sale, and let and manage his unsold real estate, and with a declaration that the unsold real estate and outstanding personal estate should be subject to the trusts thereafter declared concerning the said net moneys, and that the rents thereof should be annual income for the purpose of the same trusts, and such real estate should be considered as converted in equity. And he directed his trustees to stand possessed of the net moneys to arise as aforesaid upon trust to pay an annuity, and subject thereto, and to the payment of his debts, legacies, funeral and testamentary expenses, to stand possessed of his "residuary personal estate" upon trust as to one moiety for his son absolutely, and as to the other moiety, for his daughter for her life, with remainder for her children:—*Held*, that though there was no express direction as to the proceeds of the sale of the real estate, they did not go to the heir-at-law, but were included in the trusts of the residuary personal estate. *COURT v. BUCKLAND* - 605

**RESIDUARY LEGATEES**—Fund in Court—  
Amount—Rights of creditors - 890  
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**RESOLUTION FOR LIQUIDATION**—Registration  
See STATEMENT OF DEBTS. [699]

**RESOLUTION TO WIND UP**—*Company—Voluntary Winding-up—Extraordinary Resolution—Form of Notice—Companies Act, 1862, s. 129, sub-s. 3.*] In order to render an extraordinary resolution for the voluntary winding-up of a company valid under the *Companies Act*, 1862, s. 129, sub-s. 3, it is necessary that the notice of the meeting should express that it is intended to propose a resolution that the company is unable, by reason of its liabilities, to continue its business. *In re SILKSTONE FALL COLLIERY COMPANY* 38

**RESTRAINT OF MARRIAGE**—*Will—Second Marriage of a Man.*] A condition in restraint of the second marriage whether of a man or a woman is not void.—A testatrix gave the income of certain property to her niece (who was her adopted daughter) and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived his wife and married again:—*Held* (reversing the decision of *Hall, V.C.*), that the proviso was valid, and that the gift over took effect. *ALLEN v. JACKSON* 399

**RESULTING TRUST**—*Settlement—Joint Power of Appointment—Appointment to Trustees for Sale—Absence of Declaration of Trusts of Proceeds of Sale.*] Under a settlement real estate was limited to such uses as *A.* and *B.* should by deed jointly appoint, and subject thereto to the use of *A.* for life, with remainder to the use of *B.* for life, with remainder to the first and other sons of *B.* in tail, with divers remainders over; and there was a power of sale vested in four trustees and exerciseable at the request of *A.* and *B.*, and the survivor of them. By a deed (which contained a recital that *A.* and *B.* were desirous of selling

**RESULTING TRUST**—*continued.*

part of the settled property, and with a view to facilitate the sale and conveyance thereof to the respective purchasers, had agreed to execute the deed, A. and B., in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to shew that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale:—*Held*, that the disposition of the proceeds of sale was a question of intention; and that, both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement. *BIDDULPH v. WILLIAMS* 203

**REVOCAION**—Letters of administration—Costs of suit - - - 535  
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**RIGHT OF WAY** - - - 362  
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**RULES OF BUILDING SOCIETY**—Alteration of  
See *BUILDING SOCIETY*. [481]

**RULES OF COURT, 1875, Order II., r. 4** - 277  
See *SERVICE OUT OF JURISDICTION*.

— **Order III.** - - - 690, 691  
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— **Order XVII., r. 2** - - - 99  
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See *MOTION FOR JUDGMENT*. 3.

— **Order XXII., r. 2** - - - 84  
See *CONTEMPT, PROCESS OF*. 2.

— **Order XXVII., rr. 1, 6, 7** - 42, 57  
See *AMENDMENT AT HEARING*. 1, 2.

— **Order XXIX., r. 10** - - - 624  
See *CONTEMPT, PROCESS OF*. 4.

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See *EVIDENCE BY AFFIDAVIT*. 2.

— **Order XXXVIII., r. 1** - - - 278, 604  
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— **Order XL., r. 11** - - - 643, 692, 696  
See *MOTION FOR JUDGMENT*. 1, 2, 3.

— **Order XLIV., r. 2** - - - 445  
See *ARREST OF DEBTOR*.

— **Order XLIV.** - - - 81  
See *CONTEMPT, PROCESS OF*. 1.

**RULES OF COURT**—*continued.*

— **Order XLVI., r. 1** - - - 630  
See *STOP ORDER*.

— **Order L.** - - - 82  
See *CONTINUANCE OF PROCEEDINGS*.

— **Order LI.** - - - 11, 12  
See *TRANSFER OF PROCEEDINGS*. 1, 2.

— **Order LII., r. 4** - - - 600  
See *RECEIVER*. 5.

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See *ADDING FRESH EVIDENCE*.

— **App. A., Part 2, s. 1** - - - 691  
See *INDORSEMENT OF WRIT*. 2.

**SALE**—Capital of company—Division of proceeds  
— *Ultra vires* - - - 682

See *REDUCTION OF CAPITAL OF COMPANY*.

— Of goods—*Stoppage in transitu* - 101  
See *STOPPAGE IN TRANSITU*.

— **Partition suit** - - - 52  
See *PARTITION SUIT*.

— **Partition Act**—*Infant's real estate* - 188  
See *CONVERSION*. 2.

— **Trust for**—*Proceeds of sale* - - 203  
See *RESULTING TRUST*.

**SCHOOL**—*Election of children—Qualification*—  
— *Parishioner* - - - 160

See *ELECTION TO CHRIST'S HOSPITAL*.

**SECOND MARRIAGE OF MAN** - - - 399  
See *RESTRAINT OF MARRIAGE*.

**SECRET AGREEMENT**—*Composition with creditors* - - - 537  
See *SURETY FOR PAYMENT OF COMPOSITION*.

**SECURED CREDITOR** - - - 48, 702  
See *CREDITOR HOLDING SECURITY*. 1, 2.

**SECURITIES**—*Delivery of* - - - 643  
See *MOTION FOR JUDGMENT*. 1.

**SECURITIES FOR BILLS OF EXCHANGE**—

*Winding-up—Acceptance of Bills—Agent—Lien upon Goods.*] A company employed an agent for the sale of goods in a shop taken for that purpose.

The agent was to be paid a commission on the sale, and he was to accept bills for the company for such a reasonable amount as was represented by the goods on his premises; and if on the bills arriving at maturity the agent had not sufficient funds in his hands to meet the bills, the company were to make good the difference.—The company failed and was wound up, and at that time a bill accepted by the agent had not arrived at maturity:—*Held*, that the agent had a lien upon the goods in his hands for the amount of the bill. *In re PAVY'S PATENT FELTED FABRIC COMPANY* 631

**SECURITY**—*Estimated value of*—*Statement by debtor* - - - 702

See *CREDITOR HOLDING SECURITY*.

— **Insufficient**—*Payment out of solicitor's estate* - - - 351

See *INVESTMENT BY SOLICITOR*.

**SEQUESTRATION**—*Benefice—Liability of Sequestrator for Dilapidations—Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43).*] Where a

**SEQUESTRATION**—*continued.*

benefice was under sequestration at the death of the incumbent, and after the avoidance the buildings were inspected by the diocesan surveyor, and the bishop made an order pursuant to sect. 34 of the *Ecclesiastical Dilapidations Act*, 1871, stating the cost of the repairs required, and declaring the executors or administrators of the incumbent liable for the same:—*Held*, upon sect. 53 of the Act, that the sequestrator was not liable for the cost of the repairs, and was not entitled to deduct the same from the profits of the benefice in his hands. *JONES v. DANGERFIELD* - - - 438

**SERVICE**—Notice of action—Third party - 176  
See NOTICE OF ACTION TO THIRD PARTY.

— Notice of decree—Application by party served - - - 535

See STAYING PROCEEDINGS. 5.

— Out of jurisdiction - - - 277  
See SERVICE OUT OF JURISDICTION.

— Writ—Receiver before service - 276  
See RECEIVER. 3.

**SERVICE OUT OF JURISDICTION**—*Practice*—*Service of Writ*—*Motion for Injunction*—*Interrogatories out of the Jurisdiction*—*Judicature Acts*—*Rules of Court*, 1875, *Order II., r. 4*—*Title of Affidavit*.] When it is necessary to serve a writ in an action on a Defendant out of the jurisdiction there must be an affidavit in support of the application, and the order made under Rules of Court, 1875, *Order II., rule 4*, will provide, if necessary, for service of interrogatories, and also for the issuing of an injunction, if it should be applied for *ex parte*.—The affidavit should be intituled in the contemplated action, and also in the *Judicature Acts*. *YOUNG v. BRASSEY* - - - 277

**SETTLED ESTATES ACT**—*Persons entitled to petition*—*Tenant for Life*—*Concurrence of Parties interested*—19 & 20 *Vict. c. 120*, ss. 2, 16; 37 & 38 *Vict. c. 33*, s. 3.] An order under the *Leases and Sales of Settled Estates Acts* can only be made upon the petition of a person who is, within the meaning of the Acts, "entitled to the possession or the receipt of the rents and profits" of the settled estate, and if there is no such person, no order can be made.—The Court will not dispense with the concurrence of persons opposing an application under the *Leases and Sales of Settled Estates Acts*, if their number and the value of their interests are nearly equal to those of the persons supporting the application. *TAYLOR v. TAYLOR*. *TAYLOR v. KELLY*. *Ex parte TAYLOR* - - - 426

— Payment out of Court—Disentailing deed  
See PAYMENT OUT OF COURT. [438

**SETTLEMENT**—Marriage—Divorce - 563  
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— Mistake - - - 375  
See MISTAKE IN SETTLEMENT.

— Post-nuptial—Furniture—Bankruptcy 302  
See ORDER AND DISPOSITION. 1.

— Resulting trust—Proceeds of sale - 203  
See RESULTING TRUST.

— Voluntary—Insolvency of settlor - 636  
See FRAUDULENT CONVEYANCE.

**SHAREHOLDER**—Suit by, against company 13  
See SUIT BY SHAREHOLDER.

**SHARES**—Paid-up—Corrupt bargain—Director  
See FIDUCIARY RELATION. 1. [115

— Subscriber of memorandum - 247, 620  
See SUBSCRIBER OF MEMORANDUM. 1, 2.

— Trustee of, for company—Contributory 664  
See TRUSTEE FOR COMPANY.

**SHERIFF**—Possession by—Execution—Receiver  
See RECEIVER. 4. [454

**SHORT CAUSE**—*Practice*—*Judicature Acts*—*Action for Administration of Real and Personal Estate*—*Statement of Claim*.] Where an action by *cestui que trust* under a will against executors and devisees in trust, for administration of the real and personal estate of the testator, was to be heard as a short cause, the Court considered it unnecessary for the Plaintiff to deliver a statement of claim. *GREEN v. COLEBY* - - - 693

**SHORTHAND-WRITER'S NOTES**—Costs of appeal - - - 698  
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**SOLICITOR**—Champerty—Agreement for remuneration in case of success - 573  
See CHAMPERTY.

— Improper investment by - - - 351  
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— Non-payment of taxed costs—Attachment  
See ARREST OF DEBTOR. [445

— Winding-up—Claim on official liquidator personally - - - 130  
See OFFICIAL LIQUIDATOR.

**STATEMENT OF DEBTS**—*Liquidation*—*Registration of Resolutions*—*Debt to illegal Association*.] In the statement of affairs of a debtor who had filed a liquidation petition, there was inserted a large debt due to an illegal association. At the first meeting of creditors a liquidation was resolved on:—*Held* (reversing the decision of the County Court Judge), that the resolutions ought to be registered. *Ex parte DAY*. *In re DAY* - - - 699

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13 *Eliz. c. 5*—*Fraudulent Conveyances* - 636  
See FRAUDULENT CONVEYANCE.

13 *Eliz. c. 10*—*Leases* - - - 447  
See COVENANT FOR RENEWAL.

14 *Eliz. c. 11*—*Leases* - - - 447  
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14 *Geo. 3, c. 48*—*Insurance* - - - 410  
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8 *Vict. c. 18*, ss. 10, 11—*Lands Clauses* - 409  
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9 *Vict. c. 20*, s. 4—*Railways Clauses* - 697  
See INVESTMENT OF MONEY IN COURT.

10 & 11 *Vict. c. 34*, ss. 69, 70—*Towns Improvement Clauses* - - - 220  
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10 & 11 *Vict. c. 96*—*Trustee Relief Act* - 611  
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13 & 14 *Vict. c. 60*, ss. 15, 32, 34—*Trustees Act* - - - 46  
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- 19 & 20 Vict. c. 120, ss. 2, 16—*Settled Estates*  
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- 23 & 24 Vict. c. 145, s. 26—*Trustees and Mortgagees* - - - 226, 232  
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- 33 & 34 Vict. c. 104—*Companies Arrangement*  
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- 36 & 37 Vict. c. 66, s. 22—*Judicature Act, 1873* - - - 445  
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- 37 & 38 Vict. c. 57, s. 9—*Real Property Limitation* - - - 214  
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- 37 & 38 Vict. c. 78, s. 5—*Vendors and Purchasers* - - - 279  
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- 38 & 39 Vict. c. 77, s. 9—*Judicature Act, 1875*  
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- 38 & 39 Vict. c. 87, s. 48—*Land Transfer* 279  
*See BARE TRUSTEE.*
- 38 & 39 Vict. c. clvii.—*European Society Arbitration* - - - 326  
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**STAYING PROCEEDINGS—Company—Winding-up—Staying Action—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 85—Judicature Act, 1873, s. 24, sub-s. 5.]** Where a petition for winding up a company has been presented, an application under the *Companies Act, 1862*, s. 85, to stay a pending action against the company, ought to be made to a Divisional Court of the Division before which, or (where a Judge can be selected) to the Judge before whom the action is pending, and not to the Judge of the Chancery Division to whose Court the winding-up petition is attached. *In re PEOPLE'S GARDEN COMPANY* - - - 44

**2. — Action—Equitable Defence—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 5.]** A Defendant in an action at law having an equitable defence should obtain from the Judge of the Common Law Division leave to plead that defence, and cannot obtain from a Judge of the Chancery Division a direction to stay proceedings in the Common



**STAYING PROCEEDINGS—continued.**

Law Division: and this prevails whether the action at law was commenced before or after the Judicature Acts came into operation.—An action pending in one Division will not be stayed by another Division or Judge unless the defence is on grounds unconnected with the cause of action.—Order of *Malins, V.C.*, affirmed. *GARBUTT v. FAWCUS* - - - - - 155

**3. — Cross Bill—Corporation—Discovery.]**

An original bill was filed by a foreign Republic, and a cross bill was filed by one of the Defendants against the Republic and one of its officers, made a Defendant for the purpose of discovery:—*Held* (reversing the decision of *Malins, V.C.*), that the Court would not order proceedings in the original suit to be stayed until the officer of the Republic had appeared.—*Semble*, that the suit might be stayed until the Republic had named a proper person to give discovery.—*Semble*, that the rule is the same in the case of a Corporation. *REPUBLIC OF COSTA RICA v. ERLANGER* - - - - - 171

**4. — Judicature Act, 1873, s. 24, sub-s. 5—**

*Different Division—Voluntary Winding-up.]* The jurisdiction of the Court of Chancery in winding-up matters not being taken away by the Judicature Acts, the Chancery Division of the High Court of Justice is the proper Division in which all matters relating to winding-up business should be brought; and this applies to the stay of actions in any other Division of the Court.—The same principle applies where a company is being wound up voluntarily. *NEEDHAM v. RIVERS PROTECTION AND MANURE COMPANY* - - - - - 253

**5. — Practice—No Title in Plaintiff—Costs.]**

When the Plaintiff is, after decree, found to have no title, the suit may be stayed on the application of a person who had been served with notice of the decree.—Where letters of administration are revoked the administrator will not get his costs of an administration suit instituted by him with knowledge that another person claimed to administer.—Order of *Malins, V.C.*, varied. *HOUSEMAN v. HOUSEMAN* - - - - - 535

**STOP ORDER—Practice—Judicature Acts—Rules**

*of Court, 1875. Order XLVI., r. 1.]* It is no longer necessary, as a preliminary to obtaining a stop order on a fund standing in Court to the credit of the Chancery Division of the High Court of Justice, by a person who has a judgment in an action in another Division of the High Court, that he should obtain a charging order in that Division. *HOPEWELL v. BARNES* - - - - - 630

**STOPPAGE IN TRANSITU—Vendor and Purchaser—Unpaid Vendor—End of Transitu—Desti-**

*nation prescribed by Vendor—Constructive Possession of Purchaser—Goods on Siding at Railway Station appropriated to Purchaser—Part delivery of Goods.]* Cotton was shipped at Charleston, in America, for carriage to Liverpool. The purchaser resided at Luddenden Foot, in Yorkshire. The cotton was consigned to the vendor's agent at Liverpool, to whom the bills of lading were also sent by the vendor, together with a bill of exchange for the price of the cotton, drawn by the vendor on the purchaser.—On the arrival of the cotton at Liverpool, the bill of exchange was sent

**STOPPAGE IN TRANSITU—continued.**

by the vendor's agent to the purchaser, and upon its return accepted by him the bill of lading was sent to him. He then indorsed the bill of lading and sent it to the manager of a railway company in Liverpool, who paid the sea freight and obtained possession of the cotton, which was then forwarded by the railway to Luddenden Foot Station. The invoice of the cotton which was sent to the purchaser described it as shipped by the vendor to Liverpool, consigned to order, for account and risk of the purchaser, Luddenden Foot. The bill of lading provided for the shipment of the cotton into the port of Liverpool, there to be delivered to order or assigns, he or they paying freight immediately on landing the goods:—*Held*, that the *transitu* prescribed by the vendor ended at Liverpool, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had no right to stop it *in transitu*. *Ex parte GIBBES. In re WHITWORTH* - - - - - 101

**SUBSCRIBER OF MEMORANDUM—Contributory**

*—No Shares available for Allotment.]* The memorandum of association of a company was subscribed by M., but he took no further part in the management, and was never treated as a shareholder. His name never appeared on the register of members of the company, and the entire share capital was allotted to other persons:—*Held*, that he was not liable as a contributory. *In re TALY DRWS SLATE COMPANY. MACKLEY'S CASE* 247

**2. — Winding-up—Contributory—Preference**

*Shares—Ordinary Shares—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 8, 23.]* The memorandum of association of a company irrevocably binds a subscriber thereof to contribute the proportion of the capital for which he subscribes, but it does not bind him irrevocably as regards matters not required by the Companies Acts to be stated therein.—A person who subscribes the memorandum of association of a company for preference shares may take an equivalent amount of ordinary shares instead.—By the memorandum of association the capital of a company was divided into so many A, or ordinary shares, and so many B, or preference shares, carrying a right to a preferential dividend. D. subscribed the memorandum of association for fifty B shares. He afterwards became a director of the company, and thinking it unfair to take his qualification entirely in preference shares, applied for twenty-five A shares and twenty-five B shares, and those shares were allotted to him. There was evidence to show that the twenty-five A shares and twenty-five B shares were agreed to be taken instead of the fifty B shares for which D. signed the memorandum. The company was ordered to be wound up, and the liquidator sought to place D. on the list of contributories for fifty B shares in addition to the twenty-five A and twenty-five B shares:—*Held*, that D. was a contributory for twenty-five A and twenty-five B shares only.—*Fowler's Case* (Law Rep. 14 Eq. 316) questioned. *In re NEW BUXTON LIME COMPANY. DUKE'S CASE* - - - - - 620

**SUBSEQUENT INCUMBRANCERS—Deficiency—**

Payment out of solicitor's estate - 351  
See INVESTMENT BY SOLICITOR.

**SUIT BY SHAREHOLDER**—*Practice*—*Bill against Directors of Company*—*Shareholder's Suit on behalf*—*Authority of Chairman of Meeting*—*Motion for Adjournment*—*Mode of taking Votes*.] The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and, on being put, was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the room. One of the shareholders filed a bill on behalf of himself and all other shareholders except the directors, against the directors and the company, stating these facts, and alleging that the course taken at the meeting was taken in collusion with the directors, with a view of stifling discussion, and that the directors were intending to carry out certain measures injurious to the company without submitting the terms to a general meeting; and praying for a declaration that the conduct of the chairman was illegal and improper, and for an injunction to restrain the directors from carrying out the proposed arrangements without submitting them to the shareholders for their approval:—*Held*, on demurrer (reversing the decision of *Malins*, V.C.), that the bill could not be sustained, inasmuch as it violated the rule laid down in *Mozley v. Alston* (1 Ph. 790) and *Foss v. Harbottle* (2 Hare, 461), and asked the interference of the Court in the internal management of the company. —Whether, on a motion for the adjournment of a meeting of shareholders, the votes ought to be taken according to the number of shareholders or of the shares they represent, *quære*. *MACDOUGALL v. GARDINER* - - - - - 13

**SURETY**—Composition with creditors—Order on trustee to sue - - - - - 287  
See BANKRUPTCY JURISDICTION.

**SURETY FOR PAYMENT OF COMPOSITION**—*Secret Agreement by Debtor to indemnify Surety*—*Failure by Debtor to pay Composition*—*Subsequent Liquidation Petition*—*Validity of Resolutions*—*Registration of Resolutions*—*Bankruptcy Act, 1869* (32 & 33 Vict. c. 71), ss. 125, 126, 127—*Bankruptcy Rules, 1870*, r. 295.] The creditors of a debtor resolved to accept a composition payable in three instalments, the third instalment being guaranteed by a surety. Before the resolution was passed, the debtor had agreed with the surety to indemnify him against any liability which he might incur under his guarantee by depositing goods with him. This agreement was not made known to the creditors. After the resolutions were registered the surety accepted bills of exchange for the amount of the third instalment of the composition, and certain goods were deposited with him by the debtor. The debtor paid the first instalment, but failed to pay the second, and thereupon he filed a liquidation petition. Afterwards the surety paid the third instalment:—*Held* (affirming the decision of the Chief Judge, who had reversed the decision of the County Court Judge), that the agreement with the surety was valid, and that he was entitled to retain the goods as against the trustee under

**SURETY FOR PAYMENT OF COMPOSITION**—*continued*.

the liquidation.—The distinction between composition and liquidation by arrangement explained. *Ex parte BURRELL. In re ROBINSON* - - - 537

**SURNAME**—Use of - - - - - 441  
See NAME AND ARMS CLAUSE.

**SURVEYOR OF HIGHWAYS**—Duties of—Town improvement clauses - - - - - 220  
See OBSTRUCTION OF HIGHWAY.

**SUSPENSE PERIOD**—Accumulation of rents 653  
See ACCUMULATIONS.

**TAXATION OF COSTS**—*Composition*—*Costs*—*Taxation*—*Higher or Lower Scale*—*Bankruptcy Rules, 1871*, r. 8.] Rule 8 of the *Bankruptcy Rules, 1871*, does not apply to a case of composition. Therefore the solicitor who acts for a debtor in relation to his liquidation petition is, if the creditors resolve to accept a composition, entitled as against the debtor to have his costs of the proceedings taxed on the ordinary (not the lower) scale, even though the debtor's statement shews that his debts do not exceed £750 or that his assets do not exceed £200. *Ex parte CASTLE. In re MEIKLE* - - - - - 111

2. — *Practice*—*Costs of Appeal*—*Shorthand Writer's Notes of Proceedings in Court below*.] The charge for a copy of a shorthand writer's notes of the proceedings in a County Court allowed as part of the costs of an appeal. *Ex parte SAWYER. In re BOWDEN* - - - - - 698

— Reference for opinion of Court - - - 573  
See CHAMPERTY.

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— Settled Estates Act—Right to petition 426  
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**TENANT IN TAIL**—Proceeds of sale—Disentailing deed - - - - - 438  
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**TENDER**—Debtor's summons—More than one debt - - - - - 358  
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**TRANSFER**—Liabilities of insurance company [307, 326  
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— Liabilities of insurance company - 334  
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— Proceedings—New practice - 1, 11, 12  
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— Proceedings—New practice—Order LI. 41  
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— Shares in company - - - - - 576  
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**TRANSFER OF PROCEEDINGS—Choice of Court**

—*Transfer of Action—Costs of former unsuccessful Action.*] A Plaintiff brought an action for misrepresentation in the Queen's Bench, and discontinued it just before the *Judicature Act* came into operation. An execution for the costs failed to produce anything. The Plaintiff then commenced an action in the Chancery Division for the same purpose against the same Defendants. The Defendants moved to transfer the action to the Queen's Bench Division, on the grounds that it was a case for a jury, and could be better tried in the Queen's Bench Division, and that the action had been brought in the Chancery Division to avoid paying the costs of the former action:—*Held*, that a transfer ought not to be ordered, as the case could be tried by a jury in the Chancery Division; and as regarded the costs, the proper course was to apply to the Judge to whose Court the action was attached for a stay of proceedings till they were paid. *CANNOT v. MORGAN* - 1

2. — *Practice—Pending Suit—Rules of Court, 1875, Order LI.*] The Court of Appeal has no jurisdiction to make an order to transfer a suit which was pending in Chancery before the *Judicature Act, 1873*, came into operation, from one Judge to another. *In re HUTLEY* - 11

3. — *Practice—Pending Matter—Rules of Court, 1875, Order LI.*] The Court of Appeal has no jurisdiction to make an order for the transfer of a matter commenced by petition under the statutory jurisdiction of the Court of Chancery before the *Judicature Act, 1873*, came into operation, from one Judge to another.—*In re BOYD'S TRUSTS* - 12

**TRANSFER OF SHARES—Company—Winding-up**

—*Contributory—Purchase in Name of Trustee—Intention to escape Liability—Misdescription—Description as "Gentleman."*] *W.* purchased on the *Stock Exchange* shares in a joint stock company. On discovering that the vendor was a director of the company, *W.* gave as the name of the transferee that of a foreman in his employment at weekly wages of two guineas; and in the transfer the foreman was described as a gentleman, and his address was given at the works where *W.* carried on business. According to the articles of association a transfer could not be made without the approval of the board; and the transfer to the foreman was laid before the board and approved. Within two months of the approval being given, the company was ordered to be wound up. The foreman was at first placed upon the list of contributories, but the official liquidator, on discovering the facts, applied to have his name removed and *W.* settled as a contributory:—*Held*, that *W.* could not be placed on the list of contributories. *In re HUMBER IRONWORKS AND SHIP-BUILDING COMPANY, WILLIAMS' CASE* - 576

**TRANSITUS—Termination of.**

*See STOPPAGE IN TRANSITU.*

**TRIAL OF QUESTION OF FACT—Practice—Judicature Acts—Single Counsel.**

One counsel only will be heard on each side upon the trial of a question of fact. *CONINGTON v. GILLIAT* - 694

**TRUST—For sale—Conversion—Rights of unpaid legatees**

*See CONVERSION. 1.*

**TRUST—continued.**

— Resulting—Proceeds of sale - 203

*See RESULTING TRUST.*

— Sale of real estate - 605

*See RESIDUARY GIFT.*

**TRUST ESTATE—Receiver** - 276

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**TRUSTEE—Bankrupt—Removal from office** 43

*See BANKRUPT TRUSTEE.*

— Bare—Vendor and purchaser—Land Transfer Act - 279

*See BARE TRUSTEE.*

— For company—Contributory - 664

*See TRUSTEE FOR COMPANY.*

— In liquidation—Notice of subsequent trading - 521

*See ORDER AND DISPOSITION. 4.*

— Leaseholds—Trustee Act, 1850 - 46

*See TRUSTEE ACT.*

**TRUSTEE ACT—Trustee of Leaseholds—Intestacy**

—*Vesting Order—(13 & 14 Vict. c. 60), ss. 15, 32, 34.*] Where a sole or surviving trustee of leaseholds has died intestate and has no legal personal representative, and a new trustee has been duly appointed in his place, the Court has no power under sect. 15 of the *Trustee Act, 1850*, to make a vesting order; nor will the Court appoint an additional trustee under sect. 32 for the sake of making a vesting order under sect. 34, because such a vesting order, if made, would be a mere nullity. *In re DALGLEISH'S SETTLEMENT* - 46

**TRUSTEE FOR COMPANY—Winding-up—Contributory—Registration.**

As a security for the performance by *A.*, a vendor, of his engagement to guarantee the purchasing company a certain dividend for a period of years, it was agreed, and such agreement was incorporated into the articles of association, that the shares which formed part of *A.*'s purchase-money should be placed in the power of the company by means of a transfer to two of the directors as trustees for the company, but who were not to be registered as holders of the shares except by their own direction.—The shares were transferred by *A.* to *B.* and *C.*, two of the directors, and the share certificates, the deed of transfer, and the certificate of registration in the books of the company of the transfer deed were deposited with the bankers of the company for safe custody, but afterwards withdrawn from them to prevent their claiming any lien. After the winding-up order the names of *B.* and *C.* were for the first time placed by the official liquidator on the register of shareholders and also on the list of contributories:—*Held*, that *B.* and *C.* were not liable to be placed on the share register or list of contributories in respect of the shares which had been transferred to them as trustees for the company, under the express provision that they should not, except by their own direction, be registered as the holders of such shares. *In re WEST HARTLEPOOL IRON COMPANY. GRAY'S CASE.*

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**TRUSTEE RELIEF ACT—Assurance Society—Policy Money—Payment into Court under Trustee Relief Act—Notice of Assignment—Payment out of Court—Costs—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.]**

*A.* assured his life, and in March, 1852, assigned the policy to *B.* absolutely.

**TRUSTEE RELIEF ACT**—*continued.*

3, in December, 1869, assigned the policy to *C.* absolutely. In March, 1875, *A.* died. The office admitted *C.*'s title to the policy money, subject to production of evidence that an assignment by way of mortgage made by *A.* in March, 1851, of which the office had notice, but on which no claim had ever been made, was satisfied; and on *C.*'s declining to comply with the requisition, in July, 1875, paid the money into Court under the *Trustee Relief Act*:—*Held*, that the *Trustee Relief Act*, until extended by the 6th sub-section of sect. 25 of the *Judicature Act*, 1873, did not enable an assurance society having notice of conflicting claims to pay policy moneys into Court, unless the moneys were the subject of a trust; but that the objection could not be entertained on a petition praying payment out of Court of moneys so paid in:—*Held*, also, that the requisition was proper, inasmuch as, if the mortgage had not been satisfied, the mortgagee might, by virtue of the *Policies of Assurance Act*, 1867 (30 & 31 Vict. c. 144), have sued the office in his own name on his assignment:—*Held*, also, that the assurance society were entitled to their costs as between solicitor and client, but not to their charges and expenses. *In re HAYCOCK'S POLICY* - - - - - 611

**ULTRA VIRES**—Sale of part of capital of company—Division of proceeds among shareholders - - - - - 682  
*See* REDUCTION OF CAPITAL OF COMPANY.

**UNBORN CHILD**—Period of gestation - 460  
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**UNINCORPORATED COMPANY**—Power to make calls - - - - - 307  
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**VENDOR AND PURCHASER**—Sale of goods—*Stoppage in transitu* - - - 101  
*See* STOPPAGE IN TRANSITU.

**VESTING ORDER**—Trustee Act - - - 46  
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**VOLUNTARY WINDING-UP**—Extraordinary resolution—Forms of notice - - - 38  
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—Staying proceedings - - - - - 253  
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**VOTING**—Mode of—Adjournment of meeting 13  
*See* SUIT BY SHAREHOLDER.

**WAY**—*Road for all Purposes*—*Change in the Use of Dominant Tenement.*] The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm-house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm:—*Held* (affirming the decision of *Jessel, M.R.*), that that did not establish a right of way for carting the materials

**WAY**—*continued.*

required for building a number of new houses on the land.—*Semble*, the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate. *WIMBLEDON AND PUTNEY COMMONS CONSERVATORS v. DIXON* - - - - - 362

**WILFUL DEFAULT**—Amendment of bill at hearing - - - - - 57  
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*See* CHARGE OF DEBTS.

—Conversion - - - - - 385  
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—Death without issue - - - - - 346  
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—Devise in tail - - - - - 410  
*See* DEVISE IN TAIL.

—Devise of mortgaged estates - - - 214  
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—Gift on attaining twenty-one - - - 435  
*See* GIFT ON ATTAINING TWENTY-ONE.

—Gift *per capita* or *per stirpes* - - - 380  
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—Gift to attesting witness - - - - - 234  
*See* REPUBLICATION OF WILL.

—Gift to friendly society—*Cy-près* - - 497  
*See* CY-PRÈS.

—Gift to lawful issue - - - - - 460  
*See* GIFT TO LAWFUL ISSUE.

—Illegitimate children - - - - - 282, 644  
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—Implication—Estate tail - - - - - 410  
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—Name and arms clause - - - - - 441  
*See* NAME AND ARMS CLAUSE.

—Power of appointment - - - - - 217  
*See* EXCESSIVE APPOINTMENT.

—Republication - - - - - 234  
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—Repugnant gift—Absolute interest with gift over - - - - - 229  
*See* REPUGNANT GIFT.

—Residuary gift - - - - - 605  
*See* RESIDUARY GIFT.

—Restraint of marriage - - - - - 399  
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**WINDING-UP**—Extraordinary resolution—Form of notice - - - - - 38  
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—Lien on goods for acceptances - - - 631  
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—Official liquidator—Personal liability for costs - - - - - 130  
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**WINDING-UP**—*continued.*

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- Subscriber of memorandum - 247, 620  
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- Staying action against company - 44  
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- Staying proceedings—Jurisdiction of Chancery Division - - - 253  
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- Transfer of shares - - - 576  
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- Trustee of shares for company - 664  
     *See* TRUSTEE FOR COMPANY.

**WINDING-UP PETITION**—*Withdrawal by Petitioner—Opposing Creditors' Costs of Appearance.*  
 Where a creditor who has presented a winding-up petition dismisses his petition at the hearing, creditors who have not been served appearing to oppose the petition are entitled to their costs of appearance. *In re* PATENT COCOA FIBRE COMPANY - - - - 617

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     *See* REPUBLICATION OF WILL.

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- “Gentleman” - - - 576  
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— “More or less” - - - 61  
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- “Ordinary way of trade” - - - 151  
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